SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 294

CITY OF TEXARKANA, TEXAS,
Petitioner,

versus

ARKANSAS LOUISIANA GAS COMPANY,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for Fifth Circuit.

BRIEF FOR RESPONDENT, ARKANSAS LOUISIANA GAS COMPANY.

HENRY C. WALKER, JR.,
WILLIAM C. FITZHUGH,
WILLIAM H. ARNOLD, JR.,
Counsel for Arkansas Louisiana Gas Company.

December 3, 1938.

Montgomery-Andree Printing Co., Inc., 430-32 Chartres, N. O., La.

SUBJECT INDEX.

SUBJECT INDEX—(Continued)

SUBJECT INDEX—(Continued)

LIST OF AUTHORITIES.

LIST OF AUTHORITIES—(continued)

LIST OF AUTHORITIES—(continued)

LIST OF AUTHORITIES—(continued)

LIST OF AUTHORITIES—(continued)

TEXTS.

STATUTES.

RULES.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 294

CITY OF TEXARKANA, TEXAS,
Petitioner,

versus

ARKANSAS LOUISIANA GAS COMPANY,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for Fifth Circuit.

BRIEF FOR RESPONDENT, ARKANSAS LOUISIANA GAS COMPANY.

Preliminary.

As petitioner's brief contains certain inaccuracies and does not adequately state the case, it is necessary that respondent present a statement of the case.

Petitioner states at page 4 that Texarkana Texas, and Texarkana, Arkansas, are physically one community and that the respondent has one gas distribution plant

which serves both cities. These assertions are not to be taken as the facts in this case. Respondent denied that said cities were one community, (R. 132, 133)*; denied that the consumers in Texarkana, Arkansas, are served from the same mains as the consumers in Texarkana, Texas, R. 133, alleged that the laws applicable to each city were materially different and that few conditions were the same (R. 153). These allegations are to be taken as setting out the facts, as they were confessed by petitioner's motion to strike out.

Petitioner at page 4 states that for the entire period covered by this suit, respondent has been compelled to extend to its consumers in Texarkana, Arkansas, service at rates less than the rates granted in the Texas ordinance and collected by respondent from Texas consumers. This statement is much too wide. The rates from June 1930 to December 1, 1933, with certain exceptions, were the same in both cities. While during a short interim period of two and one-half months from December 1, 1933, to February 16, 1934, the rates in Texarkana, Arkansas, were temporarily somewhat lower than in Texarkana, Texas, it should be borne in mind that lower rates were collected in Texarkana, Texas, than in Texarkana, Arkansas, from February 16, 1934 to December 4, 1936, nearly three years.

Respondent states that the rates in the ordinance of June 13, 1930, are recited to be determined by compromise agreement. The facts are fully stated at R. 124, 125,

*Footnote: References to the record herein are to the printed pages of the original transcript certified to this court. As the record is being reprinted, the page numbers of the reprint are not yet available.

and are confessed by petitioner's motion to strike out. Section V reads:

> "A hearing as to the rates which shall be charged by the Grantee having been had, and the Grantee having waived any right to notice of the fixing of such rates, the rates to be charged by the Grantee for natural gas furnished under the provisions of this ordinance are hereby determined and fixed by compromise agreement, said rates are as follows, to-wit. . . ." (R. 13).

Petitioner at page 18 attempts to make a point regarding bond in the Railroad Commission, but in view of the clear facts, R. 178-180, it is submitted there is no substance to it, as hereinafter more specifically shown. The reference, R. 367, given by petitioner refers to answer and counterclaim filed July 12, 1934, whereas this was amended by respondent's Separate Amended Answer and Counterclaim filed July 14, 1937, R. 122-225, see specifically R. 161, 178, 179, 180, 183, 184. The latest pleadings clearly governs. But petitioner's brief in this court fails on this point to give the amended allegations which are confessed by petitioner's motion to strike out filed July 19, 1937, R. 228-231, on which final decree was rendered in the trial court.

STATEMENT OF THE CASE.

The decree in the district court was rendered solely upon the pleadings filed by the plaintiff, city of Texarkana, Texas, petitioner in this court. This resulted from the fact that the district court, on petitioner's motion, struck out the pleadings of Arkansas Louisiana Gas Company, defendant in the trial court and respondent in this court, on the

ground that they were as a matter of law insufficient as either answers or counterclaims. (R. 232). Respondent declined to plead over, and the court rendered final decree. No opinion was rendered by the district court. Upon appeal and cross-appeal, the Court of Appeals reversed the decree and remanded the case with directions to dismiss petitioner's bill, R. 423-432, *Arkansas Louisiana Gas Company v. City of Texarkana, Texas*, 97 F. (2) 5-10.

The name of the respondent in the district court, which was Southern Cities Distributing Company at the time suit was filed, was changed to Arkansas Louisiana Gas Company by amendment to the articles of incorporation on November 27, 1934. (R. 100-103, 403).

This case involves the natural gas franchise that was granted respondent on June 13, 1930, in the city of Texarkana, Texas. The history of the Texarkana, Texas, gas plant is that on December 6, 1905, a 25-year gas franchise was granted to Citizen's Oil & Pipe Line Company (R. 64), and that on March 13, 1923, an ordinance was passed by the city council of Texarkana, Texas, modifying the rates to be charged (R. 63-67), and that in 1928 respondent purchased the franchise and plant. (R. 123).

As the gas supply at Texarkana and other cities served by respondent was insufficient and inadequate, it was necessary for respondent, at very substantial expense, to construct a 20-inch transmission system for about 175 miles to the Monroe-Richland gas fields in Louisiana, and make other extensions. After these constructions were made, respondent attempted to get an increase in the gas rates in both Texarkana, Texas, and Texarkana, Arkansas.

The situation in the latter city will be discussed presently. Respondent in the first part of 1930 filed application for increased rates in the city of Texarkana, Texas, the existing rates being those set out in the above mentioned ordinance of March 13, 1923. The city council held several hearings as to the merits of the rates applied for by respondent to be charged in that city, but respondent's application was denied by the city council and respondent appealed to the railroad commission of Texas. The railroad commission came to Texarkana and conducted hearings upon the appeal. In the course of the hearings, petitioner decided to grant a somewhat increased rate schedule of rates, whereupon new proceedings were opened in the city council and further hearings were had in city council, which resulted in the city council's prescribing the schedule of rates set out in Section V of the franchise ordinance of June 13, 1930. These rates were lower than those that had been applied for by petitioner but somewhat higher than the existing rates. The railroad commission approved the new rates and dismissed the appeal pending before it, R. 124, 125. The ordinance, which embodied the prescribed rates, was subsequently, on June 17, 1930, accepted by respondent. (R. 10-19). The rates set forth in said Section V of said ordinance of June 13, 1930, were placed into effect in the city of Texarkana, Texas, and have been maintained at all times continuously from that time to the present time.

Three of the sections of said ordinance are involved in this case, Sections V, VIII-A, and IX. Section V sets out the prescribed rates and shows that they were determined and fixed by the city council of Texarkana, Texas,

after a hearing as to the rates which should be charged had been had. Section VIII-A provides that the city council of said city shall not apply for a reduction in rates nor respondent for an increase except upon a year's notice. Section IX provides that if respondent shall be finally compelled to, or should voluntarily, place into effect in the City of Texarkana, Arkansas, less rates that those prescribed in said Section V, then and thereupon the lessened rates shall apply in the city of Texarkana, Texas. (R. 18).

As the suit of the city of Texarkana, Texas, is based mainly upon the proposition that the rates in the city of Texarkana, Texas, are governed and controlled by rates in the city of Texarkana, Arkansas, the situation in Arkansas will be set out before stating the details as to Texarkana, Texas. However, respondent pleaded and will undertake to demonstrate in the argument that the rates in Texarkana, Texas, are governed, not by the rates in Arkansas, but solely by Section V of the ordinance of June 13, 1930, passed by the city council of Texarkana, Texas, under its regulatory powers defined and set out in the statutes of the state of Texas.

Events in Texarkana, Arkansas.

The city of Texarkana, Arkansas, is an entirely distinct municipality from the city of Texarkana, Texas. The former is located in the state of Arkansas and the latter in the state of Texas. The laws and the facts applicable to each city and state are significantly different in many substantial respects. In 1921 the gas franchise that had existed in Texarkana, Arkansas, was surrendered and in lieu

thereof an indeterminate permit was granted by the corporation commission of the state of Arkansas.

On May 8, 1923, the city council of Texarkana, Arkansas, passed a resolution modifying the rates to be charged in said city (R. 216-225). This resolution is materially different in certain respects from the Texarkana, Texas, ordinance of March 13, 1923, set out at R. 64-67; there is no provision in said Texarkana, Texas, ordinance similar to the payments required in Article E of said Arkansas resolution. (R. 224). In 1928 respondent purchased the gas permit and plant in Texarkana, Arkansas.

On May 30, 1930, the city council of Texarkana, Arkansas, passed a resolution fixing rates for that city that were somewhat higher than the aforesaid rates of May 8, 1923, and the new rates were put into effect in Texarkana, Arkansas. Subsequent to June 1930, a referendum petition was filed in the city council of Texarkana, Arkansas, for the purpose of securing an election and vote upon said resolution of May 30, 1930, under the referendum provisions of the Constitution of the State of Arkansas. (R. 185). The city council denied said referendum petition and refused to submit the rates to public vote because it did not consider that rate making was a proper subject matter to be reviewed in a general vote under the referendum laws. Nothing further was done regarding the referendum petition until 1931, when a suit was filed in the state court in Arkansas by B. E. Carter for mandamus to require an election upon said resolution of May 30, 1930. The court after trial held that election was required and issued mandamus for that purpose. Appeal to the Supreme Court of Arkansas and then to the United States Supreme

Court resulted in affirmance. *Southern Cities Distributing Co. v. Carter*, 184 Ark. 4, 41 S. W. (2) 1085, 285 U. S. 525, 526.

By the time this procedure was completed, considerable time had elapsed and, on the election being held and the voters being told that by going against the resolution they could secure some $60,000.00 in refunds, they naturally lost no time in abrogating the resolution. Respondent then filed suit in the federal court in Arkansas for the purpose of protecting the rates of May 30, 1930, and of enjoining the previous rates of May 8, 1923, on the ground of confiscation. Temporary injunction was secured in the district court, but the city of Texarkana, Arkansas, appealed and secured reversal of the case in the Eighth Circuit, *City of Texarkana, Arkansas, v. Southern Cities Distributing Co.*, 64 F. (2) 944. The court on rehearing struck out a statement in its original opinion regarding a contract as to rates in Arkansas, and held that the election had revoked the resolution of May 30, 1930, and the rates therein set out, and as a result, the previously existing rates of May 8, 1923, in Texarkana, Arkansas, continued as the rates in that city; and ordered the suit to be dismissed, not on the merits of said rates of May 8, 1923, or of those of May 30, 1930, but on the ground that there had been no prior attempt to gain administrative relief therefrom by any method proper for such purpose. On return of the mandate the district court in Arkansas on December 1, 1933, adjudged refunds for the period from May 30, 1930, to December 1, 1933, in the sum of $60,000.00, based on the said rates of May 8, 1923, and dismissed the company's bill without prejudice to new suit.

From December 1, 1933, to February 16, 1934, the rates charged in Texarkana, Arkansas, were the said rates of May 8, 1923, and this short temporary period of two and one-half months represents the unavoidable delay that occurred between the date of rendition of the said decree of December 1, 1933, and the date a temporary injunction was issued against the said rates of May 8, 1923, in a new suit that was filed as soon as legal procedure would permit. (The decree of the district court in the instant case adjudged petitioner reparations over this period of time, from December 1, 1933, to February 16, 1934, under Section IX of the ordinance of June 13, 1930).

This new suit in Arkansas contributes its share of complications, but it is not thought necessary to state its history except briefly: On October 23, 1933, respondent fied with the city council of Texarkana, Arkansas, an application for increased rates. (R. 20). On November 14, 1933, the city of Texarkana, Arkansas, served notice on respondent that the city council would consider reducing the rates to 40c per m.c.f. (R. 185). On December 22, 1933, the city council of Texarkana, Arkansas, after hearing, denied respondent's application for change in rates and found that the rates of May 8, 1923, were the legal rates and that they were sufficient. (R. 187). Respondent prepared suit to enjoin the said rates of May 8, 1923, and on February 9, 1934, notified the city that it would on February 16, 1934, apply to the federal court for temporary injunction, (R. 188), but in the meantime the city council of Texarkana, Arkansas, on February 13, 1934, passed a resolution prescribing 40c rates, which were lower than the existing rate (R. 187).

On February 16, 1934, the federal court temporarily enjoined the city of Texarkana, Arkansas, from enforcing either the said rates of May 8, 1923, or the said 40c rate of February 16, 1934, and from interfering with respondent in charging the rates applied for by respondent in the city council of Texarkana, Arkansas, on October 23, 1933. These increased rates were then put into effect in Arkansas and charged from February 16, 1934, to December 4, 1936. (R. 154). On December 4, 1936, the court on final hearing made permanent the injunction against the said rates of February 13, 1934, but dissolved the injunction as to the rates of May 8, 1923, and rendered judgment on the injunction bond for reparations based on said rates of May 8, 1923, (R. 144, 145). *Arkansas Louisiana Gas Co. v. City of Texarkana, Arkansas*, 17 F. Supp. 447. This decree was superseded by bond when respondent on December 16, 1933, took appeal to the Court of Appeals for the Eighth Circuit, but injunction as against said rates of May 8, 1923, pending the appeal was denied (R. 119-121). The appeal was still pending at the time of final decree in the case at bar and the litigation had not terminated. Petitioner in its brief sets out that the appeal in Arkansas resulted in affirmance on April 13, 1938, *Arkansas Louisiana Gas Co. v. City of Texarkana, Arkansas*, 96 Fed. (2) 179 (8th C. C. A.) and that certiorari was denied on October 10, 1938, Case No. 72, Advance Sheets, 83 L. Ed. 13, Pamphlet No. 1, but these facts can not affect the case at bar as they were not and could not have been pleaded nor included in the record, and therefore can not affect the case at bar as it must be tried on the record and the pleadings in the district court.

Statement as to Texarkana, Texas.

The present suit was filed by petitioner on November 16, 1933, in the district court of Bowie County, Texas, and removed by respondent to the federal court on December 20, 1933. Petitioner pleaded Section IX of the ordinance enacted on June 13, 1930, by the city council of Texarkana, Texas, and petitioner's interpretation thereof; that respondent refused to comply therewith; that respondent on November 3, 1933, had violated Section VIII-A of said ordinance of June 13, 1930, by filing application for increased rates in Texarkana, Texas; and petitioner prayed for specific performance, reduced rates for the future and retroactive reparations. Respondent answered and counterclaimed that Section VIII-A and Section IX were invalid, and set out that the rates prescribed in Section V of the ordinance of June 13, 1930, were the existing rates, but that they, or any less rates, were confiscatory and that respondent had exhausted the administrative remedies without avail and was entitled to disregard them and to increase its rates.

Petitioner on May 22, 1934, dismissed its pending suit, R. 409, and on the next day, May 23, 1934, filed the same suit over in a new proceeding in the district court of Bowie County, Texas, which was removed to the federal court. On the court holding that the dismissal of petitioner's petition in the first suit did not include dismissal of respondent's counterclaim, petitioner secured an order re-instating its suit previously dismissed, R. 410, and consolidated the first and second suits, R. 409-412.

Both sides amended in the consolidated suits. Petitioner filed motion to strike out the answers and counter-

claims. The district court sustained petitioner's motion and struck out respondent's pleadings in both cases on the ground that they were insufficient either as answers or counterclaims. (R. 232). Respondent declining to plead over, the court solely on petitioner's pleadings found that during the period from December 1, 1933, to February 16, 1934, respondent collected from its consumers in Texarkana, Arkansas, a rate less than that charged in said two and one-half months period in Texarkana, Texas, and adjudged reparations for the gas consumers in Texarkana, Texas, for said period. (R. 234).

The main issue pleaded by petitioner was that Section IX of the ordinance of June 13, 1930, was valid, that it upset and abrogated the prescribed schedule of rates set out in Section V of said ordinance, and should be construed to require reparations retroactively from June 13, 1930, and to require reduced rates prospectively.

The principal claims of respondent were that the rates prescribed in Section V of the ordinance of June 13, 1930, were paramount and controlling; that Section IX was invalid; that even if it should be held to be valid, its conditions had not been fulfilled; that respondent was entitled to relief from the existing rates because the administrative remedy had been exhausted and the rates were confiscatory; that respondent was entitled to a judicial hearing on confiscation in defense to petitioner's suit as well as by way of counterclaim.

As there are many facts to be considered, it will be helpful to give a chronological statement.

CHRONOLOGICAL STATEMENT.

The ordinance of June 13, 1930, passed by the city council of Texarkana, Texas, which has been briefly described, contains the following:

Section V.

"Section V. A hearing as to the rates which shall be charged by the Grantee having been had, and the Grantee having waived any right to notice of the fixing of such rates, the rates to be charged by the Grantee for natural gas furnished under the provisions of this ordinance are hereby determined and fixed by compromise agreement, said rates are as follows, to-wit:

Domestic and Commercial Rate.

(a) For the first one thousand (1000) cubic feet per meter of gas or fraction thereof sold to any domestic or commercial consumer during any one month—$1.00 per thousand cubic feet. Said charge shall also be made regardless of whether any gas is consumed or not.

(b) For the next one hundred and forty-nine thousand (149,000) cubic feet of gas or fraction thereof sold to any domestic or commercial consumer during any one calendar month—$.50 per thousand cubic feet. All gas sold at $.50 per thousand cubic feet is subject to 5% discount if paid within ten (10) days after bill is rendered.

(c) For all gas sold to any one domestic or commercial consumer during any one calendar month in excess of one hundred and fifty thousand (150,000) cubic feet—$.25 per thousand cubic feet. All gas sold at $.25 per thousand cubic feet is subject to $.02 per thousand cubic feet discount if paid within ten days after bill is rendered.

A charge of $1.00 shall be made for each connect or disconnect, after first installation, that is made

for the same consumer, at the same address, except where meter is removed to be replaced, repaired or for inspection.

Churches, schools or colleges maintained by State, County or City; schools or colleges maintained by any religious organization; public hospital shall be allowed a gross discount of 40% from the gross rate for domestic and commercial gas when bills are paid within ten days after being rendered. Municipal buildings shall be allowed free gas for all gas used in conducting the city's business. (R. 13, 14). Then follows the industrial rate (R. 15, 16).

Section VIII-A.

Section VIII-A. In consideration of the granting of this franchise, it is mutually agreed and understood by and between the parties hereto that before the city council of said city shall apply for a reduction in rates, or before the Southern Cities Distributing Company, its successors or assigns, shall make application for an increase in rates, either party shall give to the other party one year's notice in writing of its intention to so apply for an increase or decrease in rates, and no application for increase or decrease in rates shall be acted upon or considered unless said one year's notice is first given before making such application. (R. 17, 18).

Section IX.

Section IX. If Grantee shall be finally compelled to, or should voluntarily, place in any rates in the city of Texarkana, Arkansas, less than the rates granted by this ordinance then and thereupon the lessened rate shall apply to the city of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate. (R. 18).

The acceptance by respondent of said Ordinance reads as follows:

> The Southern Cities Distributing Company does hereby accept the Ordinance, with its terms and provisions, finally adopted by the City Council of Texarkana, Texas, on the 13th day of June, 1930.
>
> In testimony thereof, witness the signature and seal of said Southern Cities Distributing Company on this, the 17th day of June, A. D. 1930. (R. 19).

The rates set forth in the above Section V were placed into effect in the city of Texarkana, Texas, and have been maintained at all times continuously from that time to the present time.

On November 3, 1933, respondent filed with the city council of Texarkana, Texas, application for change and modification of rates (R. 19-26), stating that the existing gas rates were insufficient to pay operating expenses, depreciation, or return, and confiscatory, and proposing a sliding scale of rates, higher on the first 10,000 cu. ft. but considerably lower on the gas over 10,000 cu. ft., to-wit:

First	1000 cu. ft.	$1.75
Next	2000 cu. ft.	.75
Next	7000 cu. ft.	.55
Over	10000 cu. ft.	.35;

setting out that net losses, which had been and were being suffered under the rates in force since June, 1930, amounted to confiscation (R. 25). On November 9, 1933, respondent filed in the city council motion for prompt hearing together with affidavits. (R. 209-216). On November 10, 1933, the city council of Texarkana, Texas, passed a resolution directing the city attorney to use all available

means in law and in equity to prevent any increase in rates until such time as the council might deem that a change in rates should be justified. (R. 172).

On November 14, 1933, respondent appeared in the city council by its attorneys and witnesses and requested permission to introduce its evidence. (R. 172). The council refused this and passed a resolution pointing out that there were no provisions in the state statutes which would authorize the council to place new and increased rates promptly into effect; and ordered respondent not to put the rates into effect pending hearing of the application, but set out that the council was willing, if proper information were submitted, to consider the question whether it would waive Section VIII-A of the franchise providing for one-year notice. (R. 173, 174).

On November 16, 1933, petitioner filed suit in the district court of Bowie County, Texas, alleging that by the franchise ordinance of June 13, 1930, respondent was bound

> "to supply gas at the rates granted and established therein. Said portion of said franchise granting such rates is contained in Section V of said ordinance," (R. 5);

that respondent, in violation of the one-year provision of Section VIII-A of said ordinance (R. 5), filed with the city council on November 3, 1933, a notice and application for change and modification of rates; that respondent filed another notice on November 4, 1933 (R. 7); and prayed that respondent be enjoined from putting into effect the proposed schedule at any time or in any manner, except upon one-year notice and after pursuing the remedies pro-

vided by law (R. 9). On the same day that suit was filed, petitioner obtained a temporary injunction without notice to defendant (R. 27).

Respondent continued diligently to prosecute its application in the city council, and appeared by attorneys and witnesses before the council on November 28, 1933 (R. 176).

On December 12, 1933, the city council of Texarkana, Texas, passed a resolution referring to Section IX of the ordinance of June 13, 1930, and to a decree of December 1, 1933, rendered in Arkansas, and directed the city attorney to call upon respondent to comply with the city's construction of Section IX as a contract as to rates and to make reparations to all its consumers in Texarkana, Texas, based on Arkansas rates, and to put the Arkansas rates into effect in Texarkana, Texas, and in the event of refusal, to file suit to compel it to do so (R. 177). Said resolution was passed in the absence of respondent and without notice or hearing, in only one reading, without publication, and in violation of other requirements of the law governing the exercise of the regulatory power by the city council as set out at R. 178 and in the appendix to this brief. The city admitted that the resolution was not passed under the powers conferred on the council, as a rate regulating tribunal, but was simply the action of one party, calling upon the other party to carry out a contract and directing that suit be brought to enforce it if such other party refued (R. 178); that the resolution did not purport to be a rate order of a regulatory body (R. 179), and was not subject to appeal to the Railroad Commission under Article 6058, Revised Statutes of Texas (R. 179). In view

of this position of the city, there can be no issue in this court concerning it, as it is conceded by the city that it is not operative or valid as a rate regulatory order. See also R. 160, 180, 183, 184.

The suit filed by petitioner was removed to the federal court and respondent on December 20, 1933, filed answer and counterclaim alleging, that it was pursuing the proper remedies, that Section VIII-A was invalid, that respondent had done everything possible to get relief from daily confiscatory losses and would have no remedy for what it had lost and would lose, and prayed for dissolution of the temporary injunction, cancellation of Section VIII-A, and general relief. (R. 37-44).

On December 27, 1933, and January 2, 1934, the city council of Texarkana, Texas, postponed hearing respondent's application for change in rates, although respondent was at all times pressing for relief. (R. 181).

On January 15, 1934, petitioner filed amended petition in the federal court alleging, that the application of respondent for change in rates was in violation of Section VIII-A of the ordinance of June 13, 1930; that the respondent had the power to waive, and did waive, any right granted it by the Sta utes of Texas to obtain increased rates upon a hearing after sixty days' notice, or upon a hearing before the Texas Railroad Commission; that, if Section VIII-A were invalid, respondent had no right to increase its rates at any other time or manner than that provided by the state statutes; and that

> "Said statutes also provide that pending the hearing before the city council said increased rates should

> not be placed into effect, and in the event of an appeal, they should not be placed into effect until the appeal should be passed upon by the Railroad Commission", (R. 49);

and petitioner prayed that temporary injunction granted in the state court be made permanent, (R. 44-51); petitioner also alleged that it had another cause of action based on its construction of Section IX of the ordinance of June 13, 1930; that the consumers of gas in Texarkana, Texas, were entitled to an order from the court directing that respondent place into effect in the City of Texarkana, Texas, the rates applicable in the city of Texarkana, Arkansas; that respondent be required to make reparations in the City of Texarkana, Texas, based on the Arkansas rates. (R. 51-52).

On January 23, 1934, the city council completed hearing of respondent's application for increased rates (R. 181-183), and passed a resolution denying it because it stated that it refused to waive, but insisted upon certain provisions of the ordinance of June 13, 1930, and the resolution also ordered the city attorney "to insist upon his application now pending in the courts for an order directing said company to comply with its franchise agreement and to place in effect in Texarkana, Texas, the rates which it has been compelled to place in effect in Texarkana, Arkansas", and notifying respondent that one year later the city would enter upon a hearing to determine whether or not the rate should be reduced to 40c. (R. 285-321).

On March 3, 1934, respondent appealed to the Railroad Commission of Texas. (R. 183).

On March 9, 1934, respondent replying to petitioner's amended petition, filed answer and counterclaim, alleging: that Section VIII-A of the ordinance of June 13, 1930, was invalid; that respondent had done all it could to get relief from confiscatory rates by applying to the city council and appealing to the railroad commission; that its efforts were not unlawful; that it was suffering confiscation; that Section IX was invalid and inapplicable for reasons set out at R. 87, *et seq.*; that respondent was not then supplying gas in Texarkana, Arkansas, at the 1923 rates but at rates which were higher than those charged in the city of Texarkana, Texas (R. 20); that respondent was under no obligation to charge in Texarkana, Texas, the rates that had previously been charged in Texarkana, Arkansas; that the rates set out in Section V of the ordinance of June 13, 1930, or any lower rates were confiscatory; and prayed dissolution of the temporary injunction, cancellation of Sections VIII-A and IX, and general relief. (R. 81-98).

Petitioner prevented respondent from proceeding in the Railroad Commission of Texas. (R. 183). On April 21, 1934, petitioner filed motion to dismiss the appeal in the Railroad Commission, or in the alternative, that all further proceedings in the Railroad Commission be abated on account of the temporary injunction issued by the District Court of Bowie County, Texas, and that no action be taken until after final disposition of the suit in the federal court. (R. 183).

On May 23, 1934, petitioner filed a new suit in the District Court of Bowie County, Texas, setting up the same

causes of action as those in the first suit, and in addition made the Railroad Commission of Texas parties defendants (R. 264-283), alleging that the Railroad Commission should be enjoined

> "from entertaining said appeal and from hearing the same and from taking any action thereon and from taking any action with reference to gas rates in the city of Texarkana, Texas, until after said Southern Cities Distributing Company has complied with the provisions of said franchise agreement calling for one year's notice" (R. 272),

and that respondent be enjoined "from prosecuting or taking any further steps in its appeal which had been lodged with the Railroad Commission of Texas." (R. 281).

The situation in the Railroad Commission was,

> "Defendant undertook to proceed in the Railroad Commission and requested that plaintiff's Motion to Dismiss the Appeal be set for hearing and action, but so far its efforts to get any action at all have been unavailing." (R. 183).
>
> "Defendant has taken all the steps open to it under the Texas statutes so far as it could." (R. 162).

The Railroad Commission refused

> "to recognize or act upon the appeal at all unless defendant complies with a provision for a certain bond relating solely to the Resolution of December 12, 1933, which the Commission may not legally require," (R. 161),

and would not act unless such bond were filed. (R. 183, 184). The Commission was not authorized to grant supersedeas or to require bond on the appeal from the council's

order of January 23, 1934, which denied defendant's application for increased rates, *Harris v. Municipal Gas Co.* (Civ. App., 1930), 59 S. W. (2d) 355. The Resolution of December 12, 1933, calling on the company to comply with its interpretation of Section IX was not appealable because it was not passed under the powers of the council as a rate regulatory tribunal and was not within the purview of Article 6058, Rev. St. of Texas 1925, as admitted by petitioner (R. 178-180), and the Railroad Commission had no jurisdiction over it. (R. 183, 184).

On July 11, 1934, petitioner's new suit having been removed to the federal court, respondent filed answer and counterclaim, setting out that respondent was prevented from proceeding with said appeal to the Railroad Commission (R. 357-400), and prayed like relief as in the first suit. This second suit was No. 109 In Equity in the federal court, the first being No. 106. On September 24, 1934, petitioner filed motion to strike out the answer and counterclaim in Case No. 109 (R. 99). On September 18, 1935, an order was made, consolidating Cases Nos. 106 and 109 and directing that the motion to strike the answer and counterclaim in No. 109 be considered as going also to the answer and counterclaim in No. 106 (R. 409-412).

On December 30, 1936, petitioner filed supplemental bill in the consolidated cases, pleaded certain events in Arkansas, and prayed that respondent be ordered

(1) to place in immediate effect in Texarkana, Texas, certain Arkansas rates;

(2, 3) to pay reparations, based on the Arkansas rates from June 13, 1930, to date of decree, divided into three periods of time;

(a) June 13, 1930, to February 16, 1934;

(b) February 16, 1934, to December 4, 1936;

(c) December 4, 1936, to date of decree;

(4) that for (a) and (c) periods the reparations be distributed to the gas consumers in Texarkana, Texas;

(5) that reparations for (b) period be held in court conditioned on the outcome of the appeal in the Arkansas rate case. (R. 104-113).

On July 14, 1937, respondent filed separate amended answer and counterclaim, making numerous denials (R. 123-148), alleging that Sections VIII-A and IX were void and had been waived by the city council hearings, setting out the facts in fullest detail, and pointing out that plaintiff was undertaking for over seven (7) past years to upset *ab initio* the rates prescribed on June 13, 1930, by the city council of Texarkana, Texas, and to secure reparations for more than $150,000.00 (R. 122-209). Respondent admitted that in 1930 it applied to the city council of Texarkana, Texas, for increased rates, which was rejected by the city council, and that respondent had in 1930 appealed to the Railroad Commission; alleged that said commission on that appeal conducted hearings; denied that while such hearings were going on respondent proposed to the city council a compromise of said rate controversy (R. 124), but alleged that during the hearings in the commission, a new rate schedule was proposed by petitioner, whereupon proceedings were re-opened in the city council and new rates were prescribed and a new franchise

granted by the ordinance of June 13, 1930, and the railroad commission approved the new rates and dismissed the appeal pending before it (R. 125), and alleged that rates prescribed in Section V of the ordinance of June 13, 1930, derived their force from the exertion of the regulatory power (R. 127); admitted that the ordinance of June 13, 1930, was accepted by respondent; denied that Section IX was valid as a contract as to rates on the part of petitioner or on the part of respondent; denied that respondent's acceptance of the ordinance of June 13, 1930, made Section IX thereof valid; alleged that Section IX was violative of the state statutes, invalid, and inapplicable, for numerous reasons set out at R. 149 to 158; that Section VIII-A was invalid and inapplicable for many reasons set out at R. 158 to 162; and respondent alleged confiscation in detail (R. 189-207). The court ordered that respondent's answer and counterclaim be accepted and considered in both suits, Nos. 106 and 109 (R. 227).

On July 19, 1937, petitioner filed motion to strike the respondent's pleadings (R. 228), and on July 30, 1937, the court in final decree held that respondent's pleadings were as a matter of law insufficient either as answers or counterclaims, struck them out, and adjudged that Section IX of the ordinance of June 13, 1930, was valid; that for the period from December 1, 1933, to February 16, 1934, respondent collected in Texarkana, Arkansas, the rates prescribed on May 8, 1923, by the city council of Texarkana, Arkansas; that the city of Texarkana, Texas, was entitled to recover reparations based on the Arkansas rates of May 8, 1923, for said period; that Section VIII-A was valid and enforceable, but moot (R. 231-237).

ARGUMENT.

POINT I. The Court of Appeals Correctly Held Section IX to be Invalid.

(A) Section IX is void because it attempts unlawful abdication and delegation beyond the powers of the city council, violative of state statutes; because it is conditional, vague, indefinite and obscure; and because it would abrogate prescribed rates;

(B) Neither the city nor the gas utility company can make a valid contract as to rates to be charged; the regulatory power is not subject to suspension nor surrender;

(C) The rates set out in Section V of the ordinance of June 13, 1930, are controlling;

(D) Cases cited by petitioner not in point;

(E) The city council in taking jurisdiction and in holding hearings on the merits of the rates, abrogated and waived Section IX;

(F) Asserted discrimination does not make Section IX valid;

(G) Section IX is invalid and not a bar to judicial hearing and relief from confiscatory rates.

POINT II. Section IX was Inapplicable and Its Condition was not Fulfilled.

POINT I.

THE COURT OF APPEALS CORRECTLY HELD SECTION IX TO BE INVALID.

The Court of Appeals held that Section IX of the ordinance of June 13, 1930, was invalid. Section IX is quoted in the statement of the case, *supra*, and is found at R. 18.

Respondent's argument under Point I is divided into the following parts: (A) Section IX is void because it attempts unlawful abdication and delegation beyond the powers of the city council, violative of state statutes; because it is conditional, vague, indefinite and obscure; and because it would abrogate prescribed rates; (B) Neither the city nor the gas utility company can make a valid contract as to rates to be charged; the regulatory power is not subject to suspension nor surrender; (C) The rates set out in Section V of the ordinance of June 13, 1930, are controlling; (D) Cases cited by petitioner not in point; (E) The city council in taking jurisdiction and in holding hearings on the merits of the rates, abrogated and waived Section IX; (F) Asserted discrimination does not make Section IX valid; and (G) Section IX is invalid and not a bar to judicial hearing and relief from confiscatory rates.

(A)

Section IX is void because it attempts unlawful delegation of the regulatory power, beyond the powers of the city council, violative of state statutes, because it is conditional, vague, indefinite, and obscure, and because it would abrogate prescribed rates.

The Court of Appeals, in the opinion under review, *Arkansas Louisiana Gas Company v. City of Texarkana, Texas*, June 3, 1938, 97 F. (2) 5, said:

"Apellant insists that the clause (Section IX) is completely invalid, because an attempt on the part of the City to surrender its non-delegable ratemaking function to appellant, and the constituted authorities in Arkansas. It argues that by its charter the Texas city is authorized and obligated to exercise its governmental function of rate regulation, and that it may not, under its general powers to contract for rates, bind itself or appellant to operate under rates which may from time to time be fixed by and in Arkansas. It insists that the ratemaking function of cities in Texas embraces and includes the power to raise, as well as to reduce rates, in the interest of and in accordance with the public need. City of Seymour v. Texas Electric Service Co., 66 Fed. (2d) 814; Texas & Louisiana Power Co. v. City of Farmersville, 67 S. W. (2) 235. It urges that 'this class of functions the City must perform. The City has no option. They are not to be exercised or ignored by the municipality at discretion. * * * Such functions are legal duties imposed by the state upon its creature.' City of Uvalde v. Uvalde Electric & Ice Co., 250 S. W. 141; Texas Gas Utilities v. City of Uvalde, 77 S. W. (2d) 750. (fol. 431) It insists that this clause, which declares that 'grantee

shall not be authorized or permitted to charge or collect any higher rate than the lessened rate prevailing in Arkansas,' and if valid, obligates the appellant and the City to maintain a particular rate, merely because it has been instituted in Arkansas is contrary to the public policy of Texas, and void. It urges therefore, that the decree is fundamentally erroneous in adjudging the clause valid, instead of invalid, in retaining the bill to grant partial relief instead of dismissing it altogether. In the alternative, it argues that if wrong in this, and the clause is valid and enforcible at all, it is so only prospectively to compel the fixing of rates for the future in Texas, after they have been finally fixed either compulsorily, or by agreement in Arkansas, and not retrospectively, by way of refund, for the periods when in Arkansas the rates were in dispute." (R. 428-29; 97 F. (2) 5, 8).

"We think appellant has the right of it throughout, and that the decree should be reversed, both because the clause is completely invalid, and because, if valid and enforcible, it is without application here. But the clause is not valid. It is completely invalid and unenforcible as an attempt to abdicate and delegate the City's ratemaking function, and the decree should be reversed because it is. Whatever might be (fol. 434) said for the City's side of the case, if, as it assumes, the contract were in effect one in which the Utility had agreed, in consideration of the franchise, to maintain a fixed rate, we think it perfectly plain that the clause in question is not such a contract. Its effect is to abdicate, at least qualifiedly, the City's ratemaking function for the future, and to delegate it in the same qualified way, to the Utility and the Arkansas city.

"Under it, if the Utility decides to lower its rate in Arkansas by so much as a fraction, the rates then fixed by it become the rates which may be charged

in the Texas city. If the Arkansas city finally lowers its rates, ever so little or so much, those rates become the rates in Texas, no matter if those rates are deemed by the Texas city to be grossly unjust or inadequate. For this clause, unlike the clauses in the cases on which the City relies, is not one merely agreeing upon a rate which the Utility may charge. It is one purporting to bind the City and the Utility alike to abide by the future action of the Utility and the City of Arkansas, if less rates are put in there voluntarily or under final compulsion. The clause does not provide that the grantee shall be compelled, if required by the Texas city council, to put in the lessened Arkansas rates. It provides peremptorily and without qualification, that if the lessened rates are placed in in Arkansas, 'then and thereupon the lessened rates shall apply in the city of Texarkana, Texas, and grantee shall not be authorized or permitted to charge and collect any higher rate.' A more definite binding of the hands of the City Council, a more complete abdication of its rate-making function, a more complete delegation of it could hardly be imagined. In the light of these provisions, the supposed lack of mutuality of which appellant makes so much, and the City discounts as inapplicable, disappears from the case, for here, by a specific provision that the lessened rates shall apply, and that grantee shall not be authorized to charge (fol. 435) and collect any higher rates, is an attempt to mutually bind appellant and the City of Texarkana to any lessened rates which may in future be fixed within the Arkansas city.

"On the record before us the binding quality of this clause as it is conceived of by the City, is emphasized not alone by its suit for specific performance, by which it affirms the binding force as a contract of the clause it sues on, but by the undisputed fact that resting on the contract, it has entirely abdi-

> cated its rate-making function, and has refused, upon the application of appellant that it do so, to exercise its rate regulating powers." (R. 431-432; 97 F. (2) 5, 9, 10).

Respondent's pleadings as to Section IX are found at R. 149-153, 163-168, 170-185, 189, 190-207.

Section IX amounts to unlawful delegation, to vesting in extra-territorial authorities and bodies outside the state of Texas, the non-delegable power and duty to regulate and fix the rates to be charged in the state of Texas under the laws applicable thereto. It is not permissible under the city charter to make the rates in Texarkana, Texas, vary with and depend on conditions in another city and state, and make controlling in the city of Texarkana, Texas, the rates enforced in the city of Texarkana, Arkansas. This would be equivalent to depriving the city council of Texarkana, Texas, of its lawful and sole jurisdiction. It is *ultra-vires* the power of the council. That body is charged with inalienable duty of functioning as a rate regulatory body. It may not, by contract or otherwise, suspend, surrender, abridge, or put in abeyance its ever-present duty to regulate the rates according to law when called upon; and the council, when fixing rates may not vary the rates prescribed by it, except in a lawful and authorized method. The variation of rates in Texarkana, Texas, dependent on action in another city and automatically following a zig-zag course, violates the state statutes that define the method and the basis on which rates are directed to be determined, and amounts to unlawful delegation of the regulatory power to a city in another jurisdiction and state having an entirely different regulatory

system (R. 152). Except to avoid rate troubles, it is unjustifiable to make the rates in Texarkana, Texas, follow the course of the rates in Texarkana, Arkansas, since there are differences in the taxes and expenses of the two cities, differences in *ad valorem* taxes, occupation taxes, license taxes, insurance rates, paving-cutting requirements, different physical properties, values, quantities of pipe, public liability rates, accidents, leaked gas, differences in soil conditions, depreciation requirements; in Texas there is a workman's compensaton, while in Arkansas the common law of master and servant applies. (R. 153).

Moreover, there is no power vested in the city of Texarkana, Texas, for fixing of a conditional rate, nor a rate to be charged on a contingency or subsequent and future event, nor a rate to take effect in the present, subject to being revoked and abrogated on account of the happening of some subsequent event or condition. Such a change or modification of rates is in violation of the well established rules that rates may be changed only in the method and on the basis prescribed by statute, after notice and hearing and then only in the event the facts justify.

The duty and authority of the city council to grant franchises and fix rates is coupled with the unconditional requirement that it must be by ordinance and that it must contain all the terms and agreemnts between the parties, which means that one may not be required to go to another jurisdiction to find out what the Texas rates are, and which means further that the ordinance cannot have incorporated in it some indefinite provision as to rates to perhaps become definite, when and if certain contingencies arise, or when and if something may be done by some other

tribunal or court, or which may result from an election in some other jurisdiction.

As Section IX at the time of its enactment was construed and acted upon, it was not contemplated that any rates which had in the past been prescribed by the city council of Texarkana, Arkansas, should be brought forward to govern and control future charges which defendant could collect as applicable rates to the distribution and sale of natural gas in said city of Texarkana, Texas. Subsequent to the date of the action of the city council of the City of Texarkana, Texas, in prescribing rates in Section V of the ordinance of June 13, 1930, a number of voters, all of whom were of the city of Texarkana, Arkansas, under a referendum amendment to the constitution of the State of Arkansas, petitioned said city of Texarkana, Arkansas, to submit to the voters of said city at an election, the question of approval or disapproval by said voters of the action of said city council of Texarkana, Arkansas, in passing the Resolution of May 30, 1930, in said city. Said city council refused said petition, but later on the petition was sustained by mandamus and an election was held. Said voters had an interest to serve in the result of the election in that it was to their pecuniary advantage to keep the rates to be charged them for natural gas down to the lowest figure possible, and as a result of said election, the said action of said city council of Texarkana, Arkansas, was revoked, and it was held in litigation in Arkansas that the rates which had been fixed by action of said city council of Texarkana, Arkansas, on May 8, 1923, were continued in effect to prevail until changed by further appropriate action.

It is these rates prescribed by the city council of Texarkana, Arkansas, on May 8, 1923, that petitioner contends that it is entitled to enforce in the city of Texarkana, Texas, under and by virtue of said Section IX. The method so used to bring about a reduction of the rates in Texarkana, Texas, is contrary to and in violation of the authority delegated by the legislature of the state of Texas to the city of Texarkana, Texas, with reference to determining rates, as is apparent from the provisions of the charter of said city constituting such delegated powers. Such method was not within the contemplation of either the city council of the city of Texarkana, Texas, or of defendant at the time of the adoption of said franchise ordinance of June 13, 1930. As is apparent from the facts and circumstances alleged and the laws referred to, the method so used to procure a continuation of the rates of May 8, 1923, in the city of Texarkana, Arkansas, is wholly illegal as applied to rates in the city of Texarkana, Texas, and unenforceable as against this defendant.

The United States Supreme Court in *San Antonio v. San Antonio Public Service Co., 255 U. S. 547*, said:

> "... the supposed condition operating upon the private owner would be nugatory." and that "it resolves itself into a mere issue of the exercise by government of its regulatory power." (p. 556).

It is well settled by the Supreme Court of Texas that the statutes of Texas deprive the utilities of the power to make rates and confer that power upon the regulatory body. *Railroad Commission v. Weld & Neville*, 96 Tex. 405; 73 S. W. 532. It follows that respondent had no

power to make rates, neither by contract nor otherwise; the rates were made by the regulatory body.

Missouri-Kansas & T. R. Co. v. Railroad Commission, (Tex. Civ. App.) 3 S. W. (2) 489 reads at p. 493:

> "As tersely expressed by Associate Justice Brown in *Railroad Commission v. Weld & Neville*, 96 Tex. 405, 73 S. W. 532:
>
> > 'The Railroad Commission Law deprived railroad companies of the power to make rates and conferred that authority upon the commission . . .'" (p. 493).
>
> "In the state act, as pointed out above, the rate-making power is taken away from the carrier **altogether** and vested **exclusively** in the commission . . ." (p. 495).
>
> "The holding of the commission that the Wichita Falls rates, though approved by it, were in fact **made by the carriers, because made upon their application is unsound. Rates, to be effective under the Texas act, must be made by the commission, and are inoperative other than by force of its orders.**" (p. 496).

This case was affirmed by the **Supreme Court of Texas.** (13 S. W. (2d) 679, 682).

In Texarkana, Texas, the power to make gas rates is likewise taken away from the respondent "altogether" and vested in the city council "exclusively". When rates are made it is the city that must make them in accordance with the statutory power,—there being no power given to the city or the utility to contract, surrender, delimit, qualify, restrict, suspend, barter away, abdicate, or delegate the regulatory power.

From these excerpts it clearly appears that the rates fixed in Section V of the ordinance of June 13, 1930, in Texarkana, Texas, are operative not by reason of the acceptance by respondent of said ordinance, but having been made by the city council, they are **inoperative other than by force of the council's order. To be effective under Texas laws, rates must be made by the regulatory body.** Said rates set out in Section V, never having been set aside in the manner provided in the state statutes (the claim being that they are affected by Section IX, which is not the manner provided in the statutes), are the only lawful rates in Texarkana, Texas. As respondent at all times since June 13, 1930, has charged only such prescribed rates, no reparations are recoverable.

In this connection it will be well to bear in mind the circumstances under which the rates set out in Section V of said ordinance of June 13, 1930, were prescribed. Respondent had in 1930 made application to the city council of Texarkana, Texas, for change in rates, which, after hearing, was denied. Respondent then appealed to the railroad commisison of Texas which held sessions in Texarkana and conducted hearings. In the course of the hearings, the city council of Texarkana, Texas, decided to grant a somewhat increased schedule of rates, whereupon new proceedings were opened in the city council, and further hearings were held and this resulted in the city council's prescribing the schedule of rates set out in said Section V. The railroad commission approved the new schedule and dismissed the appeal pending before it. Later, on June 17, 1930, respondent accepted the ordinance of June 13, 1930,

which as aforesaid included in Section V the prescribed rates. (R. 124, 125).

The Commission of Appeals in the same case on writ of error, 13 S. W. (2) 679, said:

> "We fully concur in the holding of the Court of Civil Appeals in the able opinion rendered by its Chief Justice, wherein it is held that the above article does not confer authority upon the Railroad Commission to award reparations where the carrier is acting under a rate duly approved by such Commission. We think the opinion of that court so thoroughly answers the contentions here made that it renders it unnecessary for us to elaborately review the questions involved." (13 S. W. (2) 681).
>
> ". . . This tribunal being vested with jurisdiction as to ascertain what is a fair and reasonable freight rate, **its determination of the question is conclusive until set aside** by the courts in the manner provided by the statutes." *(Id. 682).*

This case was affirmed by the **Supreme Court of Texas.** (13 S. W. (2) 679, 682).

In *Nairn v. Bean* (Com. 1932), 48 S. W. (2d) 584, the Commission of Appeals in Texas said:

> "It is well settled that no governmental agency can, by contract or otherwise, suspend or surrender its functions, nor can it legally enter into any contract which will embarrass or control its legislative powers and duties or which amounts to an abdication thereof." (p. 586).

This opinion was adopted by the **Supreme Court of Texas** (p. 586).

In *Bowers v. City of Taylor* (Com. 1939), 16 S. W. (2d) 520, the Commission of Appeals in Texas said:

> "The principle is well settled that a city cannot by contract or otherwise surrender its governmental or legislative functions, nor can it legally enter into any contract which will embarrass or control its legislative powers and duties or which amount to an abdication of its governmental function or of its police power." (p. 521).

The **Supreme Court of Texas** approved the above holdings of the Commission (p. 522).

The Supreme Court of Texas in *City of Brenham v. Brenham Water Co.*, 67 Tex. 533, 4 S. W. 143, 149, said:

> "It is now universally conceded that 'powers are conferred on municipal corporations for public purposes; and, as their powers cannot be delegated, so they cannot be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties.' . . . If the contract relied on is valid, neither the repeal of the charter of the city, nor any other act of the legislature, can abrogate it."

Texas Gas Utilities Co. v. City of Uvalde (San Antonio Court of Civil Appeals, Dec. 2, 1934), 77 S. W. (2d) 750, reads:

> "In the first place, the fixing of gas rates is the exercise of a legislative power and not a judicial power. In the second place, the Legislature has delegated this power to the city council of cities having a population of more than 2,000 inhabitants, with the right

of appeal to the Railroad Commission of the state, for a trial de novo, and with a limited right of resort to any district court of Travis County. Articles 1119, 6058, 6059 R. S. 1925; *City of Uvalde v. Uvalde Electric & Ice Co.* (Tex. Com. App.) 250 S. W. 140; *Community Natural Gas Co. v. Natural Gas & Fuel Co.* (Tex. Civ. App.) 34 S. W. (2) 900; *Coleman Gas & Oil Co. v. Santa Anna Gas Co.* (Tex. Com. App.) 67 S. W. (2d) 241.

"Appellant contends that this is not a 'rate' case, but a 'discrimination' case, and that therefore article 6057 R. S. 1925, gives the district court of Val Verde County jurisdiction. Article 6057 expressly provides that different rates may be charged in different places, and the fact that appellant had a different rate at La Pryor or Carrizo Springs, or some other city, would not give a district court the legislative power of fixing rates for the city of Uvalde." (p. 751).

"It is clear that the city of Uvalde, under the provisions of article 1119 R. S. 1925, has the legislative power to fix gas rates, and, having this power, it cannot barter it away by entering into a contract for specific rates over a period of years, and this is true whether the contract is attempted to be made for the installment of a system or afterwards. *City of Uvalde et al v. Uvalde Elec. & Ice Co.* (Tex. Com. App.) 250 S. W. 140; *Railroad Commission of California v. Los Angeles Ry. Corp.*, 280 U. S. 145, 50 S. Ct. 71, 74 L. Ed. 234; *Home Tel. Co. v. Los Angeles*, 211 U. S. 265, 29 S. Ct. 50, 53 L. Ed. 176; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 21 S. Ct. 493, 45 L. Ed. 679.

"The power to fix rates is absolutely inconsistent with the power to contract for rates, and the city of Uvalde cannot possibly enter into a valid contract for rates, but rates therein must be controlled by the city's rate fixing power." (p. 752)

In *Horne Zoological Arena Co. v. City of Dallas* (Civ. App. 1932), 45 S. W. (2) 714, the Court said:

> "The general rule is that where the law creates a board to have charge of the affairs of a municipality or a particular part thereof, such board may appoint agents to discharge ministerial duties not calling for the exercise of reason or discretion, **but it cannot go beyond this and delegate to others the discharge of duties which call for reason and discretion** and which are regarded as a part of the public trust assumed by the members of such board. The power to exercise discretion in matters trusted to such boards cannot be **delegated, surrendered or bartered away.**"

In *Green v. San Antonio Water Supply Co.* (Civ. App. 1917), 193 S. W. 453, the court held that power to regulate rates is "governmental in nature" and that "it must be exercised by the body or officials to whom it is intrusted and cannot be by them delegated to others", citing *3 Dillon Municipal Corporation* (5th Ed.), p. 2233, par. 1325; Id. p. 2133, par. 1303; that this power is inherent in the state, and in Texas can be vested in a municipality, but that the power must be exercised by the city in the manner required by the charter without delegation.

In *City of Corpus Christi v. Central Wharf* (Civ. App. 1894), 27 S. W. 803, the court held that the power to provide for improvement of the harbor and wharves and for the regulation of charges for the use thereof was essentially legislative and therefore lodged in the legislature; that the act in question vested said power to the local city government for exercise in its legislative discretion for the best interest of the people; that "such powers as these, when conferred upon municipal governments, can-

not be delegated, surrendered or bartered away"; that "this principle is recognized by our Supreme Court in the case of *McDonell v. Railroad Com.*, 60 Tex. 531."

The rule of Texas, which is general, is stated in *30 Tex. Juris.*, pp. 115, 116, 117, para. 56, as follows:

> **"Delegation, Surrender, or Abrogation of Functions or Powers by Municipality or Governing Board.**—A municipal corporation cannot, by contract or otherwise, surrender, delegate, or barter away its governmental or legislative function or powers whose use and continued availability are essential to the public good; nor can it legally enter into any contract which will embarrass, prevent, control or interfere with its future exercise of such powers. A statute which attempts to give it authority so to do violates the constitutional inhibition against irrevocable or uncontrollable grants of special privileges or immunities. Moreover, governmental power must be exercised by the body or officials to whom it is intrusted; they cannot lawfully delegate it to others. The governing body cannot abrogate power and discretion vested in it by the voters or delegate powers granted it by the charter or a statute to any other officer or board or to a committee of its members. Thus a municipality cannot surrender, abrogate or barter away police power, surrender control over its property, or delegate to another municipality the right to pass legislation for it **or make a contract binding on it affecting the rates or service of a** public utility corporation."

Mr. Dillon says in Vol. 1, page 460, para. 244, that:

> "The principle is a plain one, that public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and

in such manner as it shall judge best, **cannot be delegated** to others."

The Court of Civil Appeals of Texas in *City of Texarkana v. Southwestern Tel. & Tel. Co.*, 106 S. W. 915, at 917 said:

"The public highways of the state, including even the streets and alleys within incorporated towns and cities, belong to the state, and the supreme power to regulate and control them is lodged with the people through their representatives—the Legislature. Whatever power of control is lodged in the city council is delegated by the Legislature. . . ."

"We are also of opinion that the trial court did not err in holding void the city ordinance attacked by appellee. Section 2 of said ordinance reads: . . . Conceding that the power to regulate the disturbance of the surface of streets and alleys in appellant city as against telephone companies rested in its city council, that power, as already pointed out, was a power conferred upon it by the Legislature, and one which could not be again delegated to another, as in the present instance to the city marshal. The ordinance appears to clothe the city marshal with authority to issue permits when the same were deemed necessary, and to permit that officer to determine whether or not such necessity existed. To this extent at least the ordinance was void. *G. C. & S. Fe Ry. Co. v. Riordan* (Tex. Civ. App.) 22 S. W. 519; *Bennison v. City of Galveston*, 18 Tex. Civ. App. 20, 44 S. W. 613."

See also good discussion in *Arkansas Missouri Power Co. v. City of Kennett, Mo.*, 78 Fed. (2) 911, 916-924.

The case of *Dallas Power & Light Corporation v. Carrington* (Tex. Civ. App.), 245 S. W. 1046, involved

the rates in two adjoining cities, Dallas, Texas, operating under a special act with powers and duties defined in the charter creating it, and Highland Park, a separate corporation of 2,800 population, organized under the general laws of the state subject to the limitations and having the authority set out in such general statute. The city of Dallas in 1917 granted a franchise to supply light and power to users within the city limits and beyond. The grantee in the franchise supplied light at the franchise rates of 6c in Dallas and beyond until June 1, 1920. Although Highland Park had the power by general statute to regulate the rates it did not do so nor did it grant any franchise. On June 1, 1920, the owner of the system raised the rate in Highland Park, but continued the 6c rate in Dallas. On October 14, 1920, the city of Highland Park enacted an ordinance adopting, in so far as applicable to such town, the provisions of the Dallas franchise with a view of maintaining the same character of service and rates as in Dallas, and on October 18, 1920, brought suit to enjoin the charging in Highland Park of a higher rate than that charged in Dallas, and that Section 25 of the Dallas franchise accepted by the utility, was binding on the utility. (Section 25 set out at p. 1048, may be compared with Section IX of the ordinance of June 13, 1930, of Texarkana, Texas). As to Section 25, the Court said:

> ". . . even if this section did attempt to fix a rate for Highland Park, such could not legally be done, and any effort in that respect would be a nullity. A municipal corporation, existing under a special act of the Legislature, has only such powers as are conferred it by its charter. And nowhere in the Dallas charter is the power conferred on the

city of Dallas to legislate or fix public utility rates for Highland Park. In its own sphere, each municipal corporation is supreme; but it cannot invade the province of another municipality and legislate for it, whether such legislation be for its benefit or to its detriment. Co-extensive with its own limits, the city of Dallas can legislate on all subjects affecting it, subject only to its charter limitations and to the laws of the state. But beyond this it cannot go. The laws, ordinances, and contracts of Highland Park and those affecting its internal conduct and affairs can be made by the town of Highland Park alone, subject only to the general laws of the state. Only Highland Park can contract with public utilities for service to be given and rates to be charged that municipality. The city of Dallas is powerless to do so. Therefore whether or not the city of Dallas attempted to legislate or contract for Highland Park or to fix the character of service to be given or the rates to be charged such town for light, it could not lawfully do so, and such attempt was ultra vires, beyond its charter powers, of no effect, and void." (p. 1048).

As to the ordinance adopted by Highland Park on October 14, 1920, the Court said:

"The proposition is advanced by appellees that the town of Highland Park, acting under the authority of Article 1018 of the Revised Statutes, enacted an ordinance on October 14, 1920, by which it fixed a rate to be charged for light, and that such ordinance binds appellant to furnish light to appellees on the basis therein specified. An ordinance is a by-law of a municipality passed by its governing body for the regulation, management, and control of its affairs and that of its citizens. Its validity is dependent upon strict compliance with the laws of the state relative to legislative enactments and upon the

terms of such city's charter if it has one. It must be clear, definite, and free from ambiguity. Measured by these rules, the ordinance of October 14, 1920, passed by the council of Highland Park, cannot stand. It seeks merely to adopt the provisions of the Dallas franchise relating to service and rate 'in so far as applicable to Highland Park.' As counsel for appellant facetiously remarks: 'How far is that?' Such ordinance is manifestly too vague and obscure to have any validity, and therefore is void; its meaning not being susceptible of ascertainment. McQuillin on Municipal Corporations, Sec. 651; State v. Cedaraski, 80 Conn. 478, 69 Atl. 19; Chicago I. & L. Ry. Co. v. Salem, 166 Ind. 71, 76 N. E. 631; San Francisco Woolen Factory v. Brickwedel, 60 Cal. 166. But there is another and equally cogent reason why such ordinance is of no effect. A municipal corporation can no more delegate to another municipality the right to pass legislation for it, than it can itself legislate for such other, or outside its own limits. No power or authority exists in Highland Park by state law or elsewhere either express or implied to delegate to the city of Dallas the right to make a binding contract affecting its rates or service or concerning its internal affairs. Any act attempting such unwarranted delegation of authority would be beyond its corporate powers, invalid, and unenforceable. Therefore, on account of its unauthorized attempt to delegate the lawmaking power of Highland Park to another municipal corporation as well as from its vagueness and ambiguity, the ordinance in question is void, and no right thereunder accrued to appellees by which they could force appellants to furnish light under its terms." (pp. 1048, 1049).

"We conclude therefore that the city of Dallas cannot legislate nor fix a rate for the town of Highland Park; nor can the town of Highland Park delegate such right to the city of Dallas by ordinance or other-

wise; . . . that the ordinance passed by the council of Highland Park on October 14, 1920, is invalid; . . ." (p. 1050).

For the same and additional reasons Section IX of the ordinance of June 13, 1930, in Texarkana, Texas, is void. Section IX of the franchise ordinance passed by the council of Texarkana, Texas, on June 13, 1930, is likewise very indefinite and "too vague and obscure . . . its meaning not being susceptible of ascertainment". It is unsound to read into Section IX the meaning contended by petitioner either as to the past or the future, or to make the rates in Texarkana, Texas, conform to the complicated course of the Arkansas rates. Amongst other obscurities, there is no time of duration for the Arkansas rates to be applied in the city of Texarkana, Texas.

Section IX conflicts with and, if valid, would operate to change the laws of Texas, to deprive the council of its jurisdiction, to unlawfully abrogate prescribed rates, to delegate and vest in extra territorial authorities and bodies outside the state of Texas, the non-delegable police or rate power. Moreover, the attempt would be to make the rates vary upon conditions, contingencies and uncertainties not authorized by law.

Section IX of the ordinance is ineffective for any purpose. It certainly does not even purport to provide for reparation, but, if said Section IX could be considered to be sufficiently definite and unambiguous to be interpreted to provide for refunds for any certain period, it would be invalid and void under the decisions and laws of Texas.

(B)

Neither the city nor the gas utility company can make a valid contract as to rates to be charged; the regulatory power is not subject to suspension nor surrender.

On the proposition that neither the city nor the utility in the state of Texas can make a valid contract as to the rates to be charged, it is important to set out the rules laid down in Texas as to the powers of a city and also the state statutes governing the city of Texarkana, Texas.

It is well settled in Texas that all acts of a city beyond the scope of its powers are void, and that the methods prescribed for exercise of said powers, exclude all other methods and must be followed. Squarely in point is the language of Chief Justice Cureton of the Supreme Court of Texas, in the *Waco Case* quoted and followed in the important recent case of *Texas-Louisiana Power Co. v. City of Farmersville* (Com. 1933, Justice Sharp, now a member of the Supreme Court of Texas) which was adopted by the Supreme Court of Texas, 67 S. W. (2) 235:

> "Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void." (p. 239).
>
> "In that opinion (Foster v. Waco, 113 Tex. 352, 255 S. W. 1104 by the Supreme Court, Chief Justice Cureton) it was also said: 'That where a power is granted and the method of its exercise prescribed, the prescribed method excludes all others and must be followed'". (p. 239).

The city charter of Texarkana, Texas, is a state statute which defines and limits the powers of the city council. The charter provisions make it mandatory that the power of regulating, controlling and fixing rates be retained in the city council, going so far as to say that if provisions retaining in the city council its jurisdiction over rates should be omitted from any franchise, the reservation shall be considered just as though expressly stipulated in the franchise. The city charter also commands the city council not to prescribe any rate yielding less than 10% on the actual cost of the utility plant. The following sections of the city charter, set out in respondent's pleading, R. 163-166, and in the appendix to this brief, have been in for thirty years and are still in force in Texarkana, Texas:

Section 163.

"Said proposed franchise shall contain all the terms and agreements between the parties thereto, and it must expressly set forth that the council shall have the right and privilege . . . of fixing fares, rates . . ." (R. 165).

Section 163-a.

"In the event that any franchise . . . shall not contain such stipulations . . . it shall nevertheless be considered that all of the stipulations contained in Sections 162, 163 and 197 are part and parcel of the said contract and franchise, just as though written therein . . ." (R. 165, 166).

Section 196.

"The city council shall have the power to regulate by ordinance the rates and compensation to be charged by all . . . gas . . . companies . . . ; provided that the city council shall not prescribe any rate or compensation which will yield less than ten percent per annum on the actual cost of the physical properties, equipment and betterments. . . ." (R. 166).

Article 1119, Revised Civil Statutes of Texas, 1925, which is set out in the appendix and which is the same as Article 1018 of the Revised Civil Statutes of 1911, was originally enacted in 1907. This Article, while it applies to cities incorporated under the general law, is in the identical language of Section 196 of the city charter of Texarkana, Texas. It was interpreted in the important *Uvalde Case*, infra, to prevent the city of Uvalde from having any right to contract as to rates. It is inconceivable that any different construction should be given to Section 196 of the city charter and it follows that the city of Texarkana, Texas, is likewise prohibited from contracting as to rates. (The original Article 1119 remained in force until its effective amendment in 1937; see *Texas-Louisiana Power Co. v. Farmersville* (Com.), 67 S. W. (2) 235; Vernon's Annotated Statutes, Vol. 2, p. 132, 1937, pocket parts).

Compare also *Article 1124, Revised Civil Statutes of Texas, 1925*, set out in the appendix, (R. 167), which has been in effect ever since its passage in 1921, and which provides that any city with a special charter and authority to fix and regulate rates shall in determining and regulating such rates base the same on the fair value of the property devoted to public service in such city. This article makes it mandatory for the city council to use fair value and no other basis for determining rates.

The Constitution of State of Texas provides in *Article I, Section 17*, as follows:

> "Section 17. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, ex-

cept for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof."

And *Sections 3 and 4 of Article XII* of the Constitution of the State of Texas provide as follows:

"Section 3. The right to authorize and regulate freights, tolls, wharfage or fares levied and collected or proposed to be levied and collected by individuals, companies or corporations for use of highways, landings, wharves, bridges and ferries, devoted to public use, has never been and shall never be relinquished or abandoned by the state, but shall always be under Legislative control and depend upon Legislative authority."

"Section 4. The first Legislature assembled after the adoption of this Constitution shall provide a mode of procedure by the Attorney General and District or County Attorneys in the name and behalf of the State to prevent and punish the demanding and receiving or collection of any and all charges, as freight, wharfage, fares, or tolls, for the use of property devoted to the public, unless the same shall have been specially authorized by law."

All room for doubt has been removed by the decided cases.

The leading case in Texas is *City of Uvalde v. Uvalde Elec. & Ice Co.* (1923 Commission of Appeals) 250 S. W. 140 (Judgment of the district court and the Court of Civil Appeals affirmed, adopted and entered in the judgment of the Supreme Court of Texas, p. 142). The *Uvalde Case* has been quoted, cited and approved many times, and is

decisive of the case at bar. It holds that neither the city nor the utility can contract as to rate provisions, whether or not such provisions are accepted by the utility. The trial court sustained demurrer to the city's petition. The question involved was whether or not there existed a contract as to rates.

> "By Article 1018, Revised Civil Statutes of Texas 1911, [the same as Article 1119, Revised Civil Statutes of Texas, 1925] the city councils of cities of the class of Uvalde are authorized to regulate the rates to be charged by light companies engaged in furnishing light to the public with the restriction that the city council or board of aldermen shall not prescribe any rate or compensation which will yield less than 10%. . . .
>
> "The functions of municipal corporations, though all of them are of a public nature, may be divided into two great classes . . . either governmental functions . . . in the the administration of affairs affecting the people generally, or proprietary business powers. Those functions . . . in its capacity as an agent of the state are strictly limited by the statutory provisions granting them. In the exercise of these functions, the municipality is an arm of sovereignty, and its powers are strictly construed.
>
> "**This class of functions, the city must perform. The city has no option.** They are not to be exercised or ignored by the municipality at discretion. . . . Such functions are legal duties imposed by the state upon its creature." (p. 141).
>
> * * * * * *
>
> "In other words, could the city of Uvalde surrender or barter away its power to regulate light rates by a contract suspending the exercise of that power? Since the statutes give the city no express power to contract with respect to rates for lights, whatever

power, if any, it has so to contract must arise from implication. . . . We think the city did not have implied power to make a contract for light rates. The grant of power by the Legislature to the city to regulate those rates was an exclusion of the power to make a contract for light rates that would suppress or suspend the expressly granted power to regulate.

"The power to regulate rates and the power to stipulate by contract for a term of ten years for rates cannot coexist. If the city has the power thus to contract, then it has not the power so to regulate during the term of the contract.

"The rule has been established by the courts that the Legislature may by express words authorize municipal corporations to enter into contracts prescribing the rates that may be charged by public utility corporations for a defined time, and that such contracts do have the effect of suspending, during the life of the contract, the governmental power of regulating such rates. (Citing many cases). But for a contract to have that effect the authority to make it must be clear and unmistakable. All doubts must be resolved against the municipality's authority to make such a contract and in favor of the **continuance of its governmental power.** (Citing many cases)" (page 141).

* * * * * *

"The power to regulate rates granted to the city by the legislature imposed a duty upon the city to exercise that power, and was of such a fiduciary nature that it could not be surrendered or put in abeyance. The language of the statute is:

> 'The city council of all cities and towns in the state of Texas of over two thousand inhabitants shall have the power to regulate . . . the rates. . . .'

"In the case of *Mason v. Fearson*, 9 How. 248, 259, 13 L. Ed. 125, the Supreme Court of the United States, discussing whether or not the effect of a statute was compulsory or discretionary, said:

> 'Whenever it is provided that a corporation or officer "may" act in a certain way, or it **"shall be lawful" for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third person.'"** (p. 142).

* * * * * *

"When a public body or officer is clothed by statute with power to do an act which concerns the public interest, or the right of third person, **the execution of the power may be insisted on as a duty, though the statute creating it be only permissive in its terms.**" (p. 142).

As shown below, the *Uvalde Case* (judgment recommended by the Commission of Appeals adopted by the Supreme Court of Texas) has been frequently and recently approved and quoted by the Texas courts. In this connection we direct attention to the weight to be given to the opinion of the Commission of Appeals. The Supreme Court of Texas, in July, 1935, in *National Bank of Commerce v. Williams*, 125 Tex. 619, 84 S. W. (2) 691, 692, said:

> "Finally, we wish to say that the Supreme Court is now adopting all opinions of the Commission as the opinions of the court itself. These adopted opinions are given the same force, weight, and effect as the opinions written by the members of the Supreme Court itself. There are, however, a great many opinions of the commission which appear in the Southwestern Reporter that were not adopted

> or approved by the Supreme Court. These opinions are not binding on the court in the same sense that the approved and adopted opinions are, but they are given great weight by us, and the courts of civil appeals and all lower courts should feel constrained to follow them, until they are overruled by the Supreme Court."

Petitioner states that the *Uvalde Case* came out while the *Geller Case* was pending in the Supreme Court of Texas and briefs were filed arguing the effect of that case, (p. 35 of petitioner's brief); yet the *Uvalde Case* was not qualified or criticized in any respect,—certainly it was not overruled.

In the *Geller Case* (*Dallas St. Ry. Co. v. Geller*, 271 S. W. 1106, 114 Tex. 484) the plaintiff, an elector in the City of Dallas, Texas, was held not entitled to an injunction preventing the utility from raising its rates above the alleged contractual rate designated as the maximum fare under the utility's franchise, but that the matter of rates was subject to the regulatory power. Petitioner cites the *Geller Case* as authority for the proposition that a Texas city cannot be bound by an attempted contract as to rates but that a utility may be bound by such contract as to rates,—even where rates are confiscatory. The argument of petitioner appears to be directly contrary to the *Geller Case* and to the *Altgelt Case*, 81 S. W. 106, which was quoted in the *Geller Case*, and contrary to the same case in the United States Supreme Court (200 U. S. 304) which was also quoted in the *Geller Case*, and with which the

Supreme Court of Texas stated it was in accord. Respondent does not agree that the holding of the *Geller Case* is as argued by petitioner, neither do we believe such a holding can be found in the Texas jurisprudence. No discussion or application of the *Geller Case* has been made in any subsequent cases; the *Geller Case* has been cited only once in a subsequent case in Texas, and then relating to a question of referendum, *Denman v. Quin*, (Tex. Civ. App.) 116 S. W. (2) 783 at p. 786. But the *Geller Case* is considered to support respondent. There is no conflict between its decision and the *San Antonio, Altgelt,* or *Houston Cases* in any respect, as shown below. The court in the *Geller Case* approved the holding of the Court of Civil Appeals which "held in accord with" the *Altgelt Case* and in accordance with "the other cases cited above" (*San Antonio v. San Antonio Public Service Co.*, 255 U. S. 547, and *Southwestern Tel. & Tel. Co. v. City of Dallas* (Tex. Civ. App.) 174 S. W. 636). The court said these cases held that the rate schedule was in the legislative control within the limits of the Constitution and the laws which control the rights of property. Petitioner goes so far as to attempt to make asserted contract as to rates prevail over prescribed rates which is tantamount to contending that such attempted contract rates are paramount and controlling over the regulatory power, and that the regulatory power is subject to asserted contract as to rates.

It is clear that the *Uvalde Case* has not been overruled or qualified by any other case, but has been frequently discussed, approved, quoted and cited by many Texas courts including an important case in 1935 by the Supreme Court of Texas.

The Supreme Court of Texas, in the case of *Lower Colorado River Authority v. McCraw, Attorney General of Texas,* (1935) 125 Tex. 268; 83 S. W. (2) 629, recognized the principles of the *Uvalde Case* as being well established:

> "It is well established in this state that the Legislature may, by express words, authorize municipal corporations to enter into contracts, prescribing the rates that may be charged by public utility corporations for a definite time. *City of Uvalde v. Uvalde Electric & Ice Co.* (Tex. Com. App.) 250 S. W. 140, and numerous authorities there cited. Of course, such right does not exist unless the legislative authority therefor is clear and unmistakable. Id."

In *Texas-Louisiana Power Co. v. Farmersville* (1933), 67 S. W. (2) 235, the Commission of Appeals (judgment recommended adopted by the Supreme Court of Texas, p. 240) cited the *Uvalde Case* as definitely setting a rule in Texas (p. 239). The opinion was by Mr. Justice Sharp, now on the Supreme Court of Texas.

In *Southern Prison Co. v. Rennels* (1937), 110 S. W. (2) 606, at 609, the Court of Civil Apeals cited the *Uvalde Case,* and also the case *Texas Gas Utilities Co. v. City of Uvalde,* 77 S. W. (2) 750, quoted below.

In *City of Ft. Worth v. George* (1937), 108 S. W. (2) 929, the Court of Civil Appeals quoted excerpts of the *Uvalde Case.*

In the case of *Texas Gas Utilities Co. v. City of Uvalde,* (1934), 77 S. W. (2) 750, which has been cited in

three recent Texas cases, the Court of Civil Appeals of San Antonio said:

> "It is clear that the city of Uvalde, under the provisions of Article 1119 R. C. S. 1925, has the legislative power to fix gas rates, and, having this power, it cannot barter it away by entering into a contract for specific rates over a period of years, and this is true whether the contract is attempted to be made for the installment of a system or afterwards. *City of Uvalde et al v. Uvalde Elec. & Ice Co.* (Tex. Com. App.) 250 S. W. 140; *Railroad Commission of California v. Los Angeles Ry. Corp.*, 280 U. S. 145, 50 S. Ct. 71, 74 L. Ed. 234; *Home Tel. Co. v. Los Angeles*, 211 U. S. 265, 29 S. Ct. 50, 53 L. Ed. 176; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 21 S. Ct. 493, 45 L. Ed. 679,"

and,

> "The power to fix rates is absolutely inconsistent with the power to contract for rates, and the city of Uvalde cannot possibly enter into a valid contract for rates, but rates therein must be controlled by the city's rate-fixing power." (p. 752).

City of Wink, et al., v. Wink Gas Co., (Texas Civil Appeals) El Paso, March 24, 1938; 115 S. W. (2) 973, 976 reads:

> "The power of the city to regulate rates to be charged by public utilities and to prescribe rules and regulations under which such commodities shall be furnished is governmental. It may not be bartered away. The city may not by contract impair or limit this right. The power was delegated by the state. The city, as the agent of the state, is under the duty of exercising the power when its exercise is necessary. City of San Antonio v. San Antonio Irr. Co., 118 Tex. 154, 12 S. W. (2) 546; City of Brenham v.

Brenham Water Co., 67 Tex. 542, 4 S. W. 143; Texas Gas Utilities Co. v. City of Uvalde, Tex. Civ. App., 77 S. W. (2) 750."

The Supreme Court of Texas in *City of Brenham v. Brenham Water Co.*, 67 Tex. 533, 4 S. W. 143, 149, said:

"It is now universally conceded that 'powers are conferred on municipal corporations for public purposes; and, as their powers cannot be delegated, so they cannot be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties.' . . . If the contract relied on is valid, neither the repeal of the charter of the city, nor any other act of the legislature, can abrogate it."

It is settled in Texas that no reparations are recoverable where a utility is acting under a rate approved by the appointed regulatory body and that the authorization of a tribunal vested with jurisdiction over rates is conclusive until set aside in due course, *Producers' Refg. Co. v. Missouri-Kansas & T. R. Co.* (Tex. Com. App.) 13 S. W. (2) 679, at 681, 682 (judgment of Court of Civil Appeals, as recommended by the Commission of Appeals was affirmed by the Supreme Court of Texas per Chief Justice Cureton, p. 682).

It is also well settled by the Supreme Court of Texas that the statutes of the State of Texas deprive the utilities of the power to make rates and confers that authority upon the regulatory body, *Railroad Commission v. Weld & Neville*, 96 Tex. 405, 73 S. W. 532, per Justice Brown.

This latter case was quoted and approved by Chief Justice McClendon in *Missouri-Kansas & T. R. Co. v. Railroad Commission* (Tex. Civ. App.) 3 S. W. (2) 489, at 493. Justice McClendon also said:

> "In the state act, as pointed out above the rate-making power is taken away from the carrier altogether and vested exclusively in the commission . . ." (p. 495).
>
> "The holding of the commission that the Wichita Falls rates, though approved by it, were in fact made by the carriers, because made upon their application is unsound. Rates to be effective under the Texas act, must be made by the commission and are inoperative other than by force of its orders." (p. 496).

The Commission of Appeals said:

> "We fully concur in the holding of the Court of Civil Appeals in the able opinion rendered by its Chief Justice." (13 S. W. (2) 680).

The decision was affirmed by the Supreme Court of Texas, 13 S. W. (2) 679, 682.

The United States Supreme Court also has carefully analyzed and overthrown the claim that a valid contract as to rates may be made in the State of Texas, and held that there would be such an inevitable conflict between the right to contract as to rates and the dominant power to regulate, as to render the contract inoperative and causes it to perish from the mere fact of admitting it to conflict with the authority to regulate, that it was resolved into a mere exercise of the regulatory power.

Mr. Chief Justice White, in *San Antonio v. San Antonio Public Service Company*, 255 U. S. 547, (1921), said that the solitary question to be considered was whether a contract existed empowering the city to enforce the confiscatory rate, and held that the ordinance was not and could not be a contract.

> "Indeed, this result is persuasively established by the ruling in the *Altgelt Case*, to the effect that if the contract right were conceded, there would, in view of the constitutional restriction, be such an inevitable conflict between that right and the dominant power to regulate, as to render the contract inoperative, and, therefore, to cause it to perish from the mere fact of admitting its conflict with authority to regulate." (p. 555).

> "But besides, the error underlying the proposition is not far to seek. The duty of an owner of private property used for the public service to charge only a reasonable rate and thus respect the authority of government to regulate in the public interest, and of government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal. Where, however, the right to contract exists and the parties, the public, on the one hand, and the private owner, on the other, do so contract, the law of contract governs both the duty of the private owner and the governmental power to regulate. Were, therefore, as in the case supposed in the argument, the regulating power of government wholly uncontrolled by contract, it would follow that the power would be required to be exerted, and hence the supposed condition operating upon the private owner would be nugatory. Such a case really presents no question of a condition, since it resolves itself into **a mere issue of the exercise by government of its regulatory power.**" (p. 556).

The Court further referred to "assumed restraint" put by an existing contract as to rates, and said that the contentions of the city illustrated

> "the erroneous theory upon which the entire argument of the city proceeds; that is, that limitations by contract upon the power of government to regulate the rates to be charged by a public service corporation are to be implied for the purpose of sustaining confiscation of private property." (p. 558).

This case, which arose upon application of the utility for a rate increase which was refused by the city on the ground that the company was bound by the franchise contract to a 5c fare, affirmed the district court's holding that the company not bound by contract and enjoining the city from enforcing the asserted contractual rate and from interfering with the company in substituting a 7c fare for the 5c fare. (p. 554). The holding was that there was not and could not have been a contract as to rates. As the facts in the case at bar are very close, the reasons that were controlling there should be controlling here. The prescribed rates are conclusive until changed for the future in the manner prescribed in the state statutes. Where rates that are approved by the regulatory body, are made upon the company's application, they derive their force solely from the orders of the regulatory body and not by force of agreement. If there could have been a contract as to rates, there was one in San Antonio. The provision in the franchise was that the company charge 5c. In 1917 the company petitioned the city to consent to consolidation of properties and the city consented by an ordinance "which expressly subjected the Public Service Company to all the

limitations, duties and obligations" which rested upon the Traction Company and the Gas & Electric Company (p. 550). The company accepted the provisions of the ordinance. The company later applied for an increase in rates above the 5c. The city claimed the company was bound by contract to the 5c fare and found as a fact that the hearing had shown no necessity for (p. 552) change in the rates. Suit followed, and motion to dismiss was filed (p. 552) as in the case at bar, on the ground that, whether or not the rates were confiscatory, the company was bound by contract to the 5c rate. The court overruled the motion to dismiss and the city answered asserting "an estoppel to deny the contract" (p. 553). The United States Supreme Court overruled this argument.

The city also argues that if no contract was possible that "would bind the city not to lower the rate, . . . nevertheless it was a unilateral contract or condition resulting from the granting of the franchise which bound the railway company to the franchise rate" (p. 556). As to this the court said there was no attempt consciously to produce such a condition, **"But besides, the error underlying the proposition is not far to seek".** That the duty of the government to regulate by fixing a reasonable rate was interdependent and reciprocal with the duty of the company to charge only a reasonable rate, that the **supposed condition operating upon the private owner would be nugatory, that it was resolved into the mere exercise by government of its regulatory power.** (p. 556).

The court then set out that the city proceeded upon assumption that, because the city exacted as a condition

for its consent to consolidation that the existing obligations should be preserved, a contract as to the 5c fare arose. The error was equally apparent, said the court. In the case at bar, the rates set out in Section V of the ordinance of June 13, 1930, were **arrived at after hearing before the council and appeal to the railroad commission in 1930 and still other hearings before the council.** (R. 125). The city held lengthy hearings on the company's application, asserting the right of the city to give or not to give consent to a change of rate. The court then referred to "assumed restraint put by an existing contract", and held that limitations on the regulatory power were not to be implied.

In the case at bar petitioner argues that limitations are to be put upon the regulatory power, but it will be remembered that the state statutes authorize no limitation, qualification or curtailment of the regulatory power—but command express reservation. Every reason set out in the *San Antonio Case* is material and should have great weight, because the reasons have been time and time again reiterated and approved in many subsequent decisions, notably in the *Houston Case,* and in the *Los Angeles Case,* which are important cases in the United States Supreme Court.

The United States Supreme Court has also held that an agreement between a utility company in Texas and the city of Houston, Texas, as to the basis for fixing rates, is void and invalid as to both the city and the company; that such an agreement though accepted and acted upon did not amount to an estoppel and that neither party was bound.

In *Houston v. S. W. Bell Tel. Co.* (1922), 259 U. S. 318, involving the objection of the City that the utility was

bound by ordinance as to the basis for fixing rates, the court said:

> "This ordinance contained the provision that the company 'agrees that it will not increase rates as at present charged by it for service in the city of Houston, unless it appears upon a satisfactory showing . . . that there exists a necessity for an increase of charges, in order that the said company may earn a fair return upon its **capital actually invested** in the Houston plant.'
>
> "It is now contended by the city that the acceptance of this ordinance estops the company from asserting that the value of its plant, as of the date of the inquiry, and not the cost of it,—the 'capital actually invested,' shall be the basis for rate-making, but the company contends that the quoted provision of the State Constitution rendered the City incapable of contracting by such an ordinance, and that therefore, it is void and not binding on either party." (p. 320).

and

> "The asserted reason for this contention is that the Merger Ordinance of 1915 and the acceptance of it by the Company did not constitute a contract binding upon either the city or the company, but that, though contractual in form, it was void under the provisions of the State Constitution and the decisions cited supra. In its answer the City avers that it did not and could not by that ordinance or otherwise, limit its rate-making power for the future. But, notwithstanding this agreement of the parties that the Merger Ordinance was void, the court held that the company, having accepted and acted upon it, was estopped to claim that it was not bound by its terms. Misrepresentation not being involved, mutuality was necessary to any estoppel growing out of this transaction, and, while thus asserting that the ordinance is void as to itself, the

city may not successfully assert that its adversary is bound by the acceptance of it. We think that neither party was bound by the ordinance and the acceptance of it, that the district court fell into error, and that the proper base for rate-making in the case is the fair value of the property, used and useful by the company, at the time of the inquiry." (p. 324).

It should be noted that the *San Antonio* and *Houston* decisions in the United States Supreme Court have been frequently cited, approved, and applied in the many subsequent opinions. In the case of *City and County of Denver v. Stenger* (1922), 277 F. 865 (Eighth Circuit Court of Appeals) a receiver, operating a utility, sought to enjoin the city of Denver from enforcing asserted rate contract and from interfering with the company in charging higher rates:

"It is claimed by appellant that the **five-cent fare was a condition of the grant, and its acceptance created a binding contract on the part of the Tramway Company. It can be seen that this might be so as to some conditions of the grant, but as to the fares** appellant claims that the city of Denver and the city and county of Denver were bound only until they desired to change the fares. These ordinances were not contractual in form, and, adopting the construction placed upon the same by the appellant, we do not see how they could be called contracts binding upon both parties.

"The appellant asserts that, **while it cannot make a contract which shall suspend** its power to regulate the fares to be charged by the Tramway Company, it could by granting the ordinance of 1885, 1888, and 1906, **bind the Tramway Company for as long or as short a time as appellant might desire not to change the fares.** If, however, the appellant can at

any time change the fares—in other words, refuse to be bound by contract—how does mere delay cure the lack of mutuality? A party to a contract is bound, or he is not bound, from the time of its execution. To say that a party is bound as long as he wants to be bound simply means that he is not bound at all. Upon the question of whether the parties to these ordinances intended to contract, and upon the question as to whether, if there was a contract, it would be void for want of mutuality, the following cases seem to us to be decisive against the claim of appellant." (The court here cited numerous cases, including *Home Tel. Co. vs. Los Angeles*, 211 U. S. 265; *San Antonio Public Service Co. vs. City of San Antonio (D. C.)* 257 Fed. 467; *City of San Antonio vs. San Antonio Pub. Serv. Co.*, 255 U. U. 547; *Central Power Co. vs. City of Kearney*, 274 Fed. 253 Court of App. 8th Circuit Opinion filed July 13, 1921; *City of Dallas vs. Dallas Tel. Co.* (C. C. A.) 272 Fed. 410),

and

"We are of the opinion that the quoted provision of the Colorado Constitution, under the interpretations given similar provision in the Constitutions of the states of **Texas,** Missouri, and Louisiana, the Code of Iowa, and the statute of Nebraska, clearly prohibit the making of a contract suspending the power of the city and county of Denver or the city of Denver to regulate the fares of the Tramway Company. **The history of the litigation in regard to the constitutional provisions of the state of Texas are to be found in San Antonio Traction Co. vs. Altgelt, 200 U. S. 304; San Antonio Public Serv. Co., supra; San Antonio Public Serv. Co. vs. City of San Antonio, supra; City of Dallas vs. Dallas Tel. Co., supra.**"

In *Nebraska Gas & Electric Co. v. City of Stromsburg, Neb.*, 2 F. (2) 518 (8 C. C. A. 1924) by Sanborn, Circuit Judge, and Faris, District Judge, Lewis, Circuit

Judge, dissenting, the court held it to be inevitable that the contract was not mutual or binding alike upon both parties, approved the *Denver Case*, cited the case of *Houston v. Telephone Co.*, 259 U. S. 318, and reversed the district court with instructions to hear the counterclaim, and if proven, to enjoin the rates as confiscatory. In the case of *Central Power Co. v. Kearney*, 274 F. 253 (Eighth Circuit), arising in the State of Nebraska, Judge Sanborn was a member of the court, and strong reliance was placed upon the *San Antonio Case*, 255 U. S. 547.

Consideration will now, for the purpose of comparison, be given to United States Supreme Court cases that originated in **Illinois, Iowa, Florida, Minnesota** and **California,** wherein the principles set out in the Texas cases and in the United States Supreme Court cases that arose in Texas, were reiterated and fully sustained.

On the distinction between the power to contract as to a franchise and the power to contract as to rates a good discussion is found at page 598, in *Freeport Water Company v. City of Freeport* (McKenna 1901), 180 U. S. 587, arising in **Illinois.**

In *Southern Iowa Elec. Co. v. Chariton* (1921), 255 U. S. 539, the federal district court in **Iowa** had enforced franchise rates on the ground that they were contracts. The contention of the city of Chariton that rate contracts were enforceable was overthrown by the U. S. Supreme Court, per Mr. Justice White:

> "The existence of a binding contract as to the rates upon which the lower court based its conclusion is,

> therefore, the single issue upon which the controversy depends. Its solution turns, first upon the question of the power of the parties to contract on the subject, and second, if they had such power, whether they exercised it. As to the first, assuming, for the sake of argument only, that the public service corporations had the contractual power, the issue is, had the municipal corporations, under the law of Iowa, such authority?"

This excerpt is followed by approval and lengthy quotations by the U. S. Supreme Court of *Woodward v. Iowa R. Co.*, 178 N. W. 549, and *Ottuma R. Co. v. Ottuma*, 178 N. W. 905. In the latter case appears citation of the *San Antonio Case* (D. C.), 275 F. 467, by U. S. District Judge West. (p. 564). The U. S. Supreme Court held that there could be no valid contract as to rates in that state.

In a case arising in the State of **Florida**, *Ortega Co. v. Triay* (1922), 260 U. S. 103, the Court said:

> "The case is in narrow compass. Its purpose is to enjoin appellee, as receiver of Jacksonville Traction Co. from collecting more than a particular fare, 5c, and compelling the specific performance of an alleged contract providing for such fare." (p. 104).
>
> "To support this view, appellant presents a somewhat involved and elaborate argument. . . . And this, the further contention is, necessarily means the power to reduce, not to increase. In one direction only, is the contention, may the legislature modify rates, and 'that direction is down' ". (p. 109).
>
> "We think, however, the power to increase as well as decrease rates is an inevitable deduction from the reasoning of the cases." (p. 109).

In the case of *St. Cloud Pub. Service Co. v. St. Cloud* (1924), 265 U. S. 352, was presented an issue arising in **Minnesota** as to whether the ordinance constituted a contract as to rates, and the court held that the laws of that state permitted the city and the company to contract.

> "It has long been settled . . . that the effect of such a contract (as to rates) is to **suspend** during its life, the governmental power of fixing and regulating rates. . . . The existence of a binding contract . . . is, therefore, the controlling issue upon which this controversy depends. Its solution depends upon whether the city had the power to contract on this subject. . . . Was the city authorized to enter into a contract as to the rate to be charged for fuel gas?" (p. 356).
>
> "And where a municipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises the power to contract, its power to regulate the rates during the period of the contract is thereby **suspended**, and the contract is binding." (p. 360).
>
> "The city, clearly, could not avail itself of this statute to reduce the gas rates below the maximum prescribed in the contract of 1905; and the company conversely, cannot under it obtain higher rates."

It should be noted that the power that existed in Minnesota is totally absent in the state of Texas.

In **California**, seventy-three franchises providing that the "rate of fare . . . shall not exceed 5c" were involved in the important and thoroughly considered case of *Railroad Com. v. Los Angeles Ry. Corp.* (1929), 280 U. S.

145. There were still other franchises but it was by the court assumed that the 5c fare applied over all lines. The utility had applied to the Railroad Commission of California for a 7c fare, but its application was denied. The U. S. Supreme Court said:

> "The sole controversy is whether the company is bound by contract with the city to serve for the fares specified in the franchises, it being conceded that the finding below respecting the inadequacy of the 5c fare is sustained by the evidence." (p. 151). "This court is bound by the decisions of the highest courts of the state as to powers of their municipalities. Our attention has not been called to any California decision, and we think there is none, which decides that the state legislature has empowered Los Angeles to establish rates by contract. This court is therefore required to construe the state laws on which appellants rely . . ." (pp. 151, 152).

The Court, referring to the California *Civil Code* (March 21, 1872), said:

> ". . . Section 497 (of the Civil Code) authorizes political subdivisions to grant authority for the laying of railroads in streets **'under such restrictions and limitations' as they may provide.** Stat. 1891, p. 12. **This is too general."** (p. 153).

The Court then referred to the *Broughton Franchise Act* and said that it

> "nowhere expressly empowers the city to establish rates by contract. This court in the *Home Tel. & Tel. Co. Case* dealt with the quoted provision. It said, (p. 275):
>
> > 'Here is an emphatic caution against reading into the act any conditions which are not clearly

> expressed in the act itself. . . . It cannot be supposed that the legislature intended that so significant and important an authority as that of contracting away a power of regulation conferred by the charter should be inferred from the act in the absence of a grant in express words. But there is no such grant.'"

The Court, referring to an *Amendment of June 8, 1915, to the Broughton Franchise Act*, said:

> "And, so far as concerns the matter under consideration, the Act was not expanded by the Amendment of June 8, 1915. It authorizes grantors of such franchises to impose **such additional terms and conditions, 'whether governmental or contractual in character', as in their judgment are in the public interest. This general language does not measure up to the rule earlier invoked** here by Los Angeles and applied by this court in the Home T. & T. Co. Case."

The appellants also invoked the City Charter of Los Angeles, *(Statutes of California, 1913)*, quoted in the margin at 280 U. S. 155:

> "The city . . . shall have the right and power: To grant franchises . . . for furnishing . . . transportation . . . or any other public service; to prescribe the terms and conditions of any such grant . . ." (Stat. 1913, p. 1633).

As to these statutory provisions, "grant franchises" and "prescribe the terms and conditions of any such grant", the court said:

> "But it requires no discussion to show that **they are not sufficient to empower the city by contract to establish rates**". (p. 155).

The conclusion of the United States Supreme Court was:

> "Appellants have failed to sustain their contention that the city was empowered to make such rate contracts." (p. 156).

Los Angeles, under its special charter, had the power to grant franchises and "to prescribe the terms and conditions of such grant"; whereas Texarkana, Texas, under its special charter, has the power to grant franchises which "shall contain all the terms and agreements", but **"it must expressly set forth** that the council shall have the power and privilege of . . . fixing rates." (R. 165, 166).

Mr. Justice Brandeis, in his dissenting opinion in the *Los Angeles Case*, made this statement:

> "In *So. Iowa Elec. Co. vs. Chariton*, 255 U. S. 539, a case coming from Iowa, it was held, following Iowa decisions, that, since the city lacked power to bind itself, there was no contract. And there is a statement to that effect in *San Antonio vs. San Antonio Pub. Serv. Co.*, 255 U. S. 547, 556." (p. 163). "But in *Southern Utilities Co. vs. Palatka*, 268 U. S. 232, the question was expressly left open." (p. 163).

It should be noted that the powers of the city of Palatka, Florida, since it had no power to regulate rates, are significantly different from those of the city of Texarkana, Texas, as it does have the power to regulate. The court, in the *Palatka Case*, 268 U. S. 232, expressly stated:

> "There is nothing in this decision inconsistent with *So. Iowa Elec. Co. vs. Chariton*, 255 U. S. 539; *San Antonio v. San Antonio Pub. Serv. Co.*, 255 U. S. 547, and *Ortega v. Triay*, 260 U. S. 103."

CONCLUSIONS.

The conclusions to be drawn from the foregoing case are plain, and decide the case at bar. The rate-making power and contracting power are inconsistent and incompatible and the two cannot co-exist; the legislature having imposed upon the city council of Texarkana, Texas, the duty to make rates the contracting power as to rates is precluded; the rate-making duty is likewise inconsistent with and prevents any abridgment, suspension, surrender or barter by contract or otherwise. Section IX of the franchise is therefore wholly void.

Respondent is not estopped from asserting the invalidity of Section IX, *San Antonio Case*, supra, and public policy requires that it assert such invalidity in order to be able to maintain its properties, its present high standard of service, and in general its duties of a public nature.

It should be noted that the respondent utility serves approximately 200 cities, towns, and communities on its entire system and that its problem in maintaining high standards of service and in charging a fair price for its services are not confined only to Texarkana, Texas; the unit for ratemaking is the city no matter how many towns are served, and each city must stand on its own feet; if insufficient revenues are obtained in the city of Texarkana, Texas, the utility will not be allowed to recoup its losses by charging increased rates in other cities and towns served by it, *Wabash Valley Elec. Co. v. Young*, 287 U. S. 488.

This being true, it is difficult to see why the city of Texarkana, Texas, feels it would benefit from compelling the utility to charge rates so low as to be confiscatory.

While there may be a temporary benefit through reduced rates, the detrimental effect on the service and the loss in the efficiency of the Texarkana system would be greater to the customers than their saving through the rates. If reparations are to be made under Section IX, where are they coming from? The return at Texarkana, Texas, already being insufficient, is the Texarkana plant going to borrow the money to make these refunds, or will the other towns be expected to bear the expense of paying the Texarkana customers their refunds? The company is under a duty to maintain adequate depreciation reserves for the purpose of maintaining the efficiency of its property and the daily wear and tear and decay occurring thereon. Can the company maintain such reserves, pay its operating expenses, the interest on borrowed capital, and at the same time make the refunds and stand the cut in rates here demanded? All of these questions are matters which go to the very heart of the company's public policy as well as public policy to be construed by the courts.

The "public" that the utility is serving is the **whole body of customers** in the 200 cities and towns on its whole system and it is totally unfair for Texarkana, Texas, to demand a special privilege and rate not enjoyed by the other cities and towns served simply because of a provision inserted in the franchise.

The rates now being charged in Texarkana, Texas, are among the lowest in the United States, and nothing but harm can come from a further reduction in rates and further confiscation of defendant's property and business. Thus, we submit that not only is the law wholly on defendant's side, but sound public policy as well.

(C)

The rates set out in Section V of the Ordinance of June 13, 1930, are controlling.

Respondent, from the time the rates were prescribed by the city council of Texarkana, Texas, in Section V of the ordinance of June 13, 1930, to the present time, has collected in Texarkana, Texas, only the rates prescribed and set out in said Section V and has followed and applied them exclusively (R. 142, 143, 233). Said rates were prescribed after hearing, as confessed by petitioner's motion to dismiss in the district court. Said Section V, quoted in the statement of the case, supra, and found at R. 13, sets out that a hearing as to the rates which shall be charged, was had. The facts as to its enactment are found at R. 124, 125.

Respondent on November 3, 1933, filed application for increased rates and pursued it until the administrative remedies thereon were exhausted without avail. The city council on January 23, 1934, passed an ordinance setting out its refusal to exercise its regulatory power (R. 432) and denying the application because of its refusal to waive and insistence upon the provisions of the ordinance of June 13, 1930 (R. 285-322), but directing the city attorney to pursue the litigation in the courts to enforce compliance with petitioner's interpretation of Section IX (R. 320-321). The ordinance also gave notice that the city would one year later enter upon a hearing to determine whether or not a rate-reducing order should not be made (R. 321). No such hearing has been had, and no rate-reducing order was made. Under these circumstances respondent contends that petitioner has no cause of action to recover retro-

active reparations, nor does it have any present cause of action to reduce the existing rates. On the other hand respondent contends that it was and is entitled to a judicial trial on its allegations that the existing rates, or any less rates, are so low as to be confiscatory, which for the purpose of this case is confessed by petitioner's motion to dismiss.

Aside from respondent's right to contest the rates, respondent contends that the rates set out in Section V are final, conclusive, and uncontrovertible, and that respondent should not be forced to make reparations, nor to reduce the existing rates without notice, hearing and a rate-reducing order in due course for the future.

Petitioner's contention was just this; on November 16, 1933, petitioner filed suit in the district court of Bowie County, Texas, alleging that by the franchise ordinance of June 13, 1930, respondent was bound

> **"to supply gas at the rates granted and established therein. Said portion of said franchise granting such rates is contained in Section V of said ordinance,"** (R. 5).

Respondent had on November 3, 1933, applied for increased rates, but the city countered this by its suit. However the city council, later on, denied respondent's application by order dated January 23, 1934 (R. 285, 322), on the ground that respondent was barred by the ordinance of June 13, 1930. Respondent in its answer to the suit resisted the enforcement of the Section V rates or any lower rates. The order of January 23, 1934, also notified respondent that one year later the city of Texarkana, Texas,

would enter upon a hearing for the purpose of determining whether or not the rates should be reduced (R. 321). But no hearing was entered upon at the time indicated, nor at any time since.

A good statement of the rule as to rates fixed by regulatory bodies in the states, particularly in Texas, is contained in concurring opinion (Circuit Judge Hutcheson) in *Eagle Cotton Oil Co. v. Southern Ry. Co.* (1931, C. C. A. 5), 51 F. (2) 443, at page 446:

> "Under their systems their Commissions make their rates, and until set aside by the courts they are final and conclusive on carrier and shipper alike.
>
> "In the state of Texas, for example, the law requires, not the carriers, but the Commission to establish reasonable rates. . . . Unless upon a timely suit the rates are found unreasonable, they are by law made uncontrovertible as between carrier and shipper, *Missouri-Kansas & T. R. Co. vs. Railroad Commission* (Tex. Civ. App.) 3 S. W. (2) 489; *Producers' Refg. Co. vs. Missouri K. & T. R Co.*, (Tex. Com. App.) 13 S. W. (2) 679. . . ."

It is also well settled by the Supreme Court of Texas that the statutes of the State of Texas deprive the utilities of the power to make rates and confers that authority upon the regulatory body, *Railroad Commission v. Weld & Neville*, 96 Tex. 405, 73 S. W. 532, per Justice Brown.

Petitioner's argument is that the rates set out in Section V are maxima rates and therefore subject to reparations. This argument is claimed by petitioner at p. 66 to be supported by *Community Natural Gas Co. v. Natural Gas & Fuel Co.*, 34 S. W. (2) 900, a case of competing gas

companies (opinion by the Court of Civil Appeals) but even a casual reading of that case shows to the contrary. This case is discussed by respondent, *infra*. However it should be pointed out that petitioner's quotation at p. 68 is misleading. It was the rates of the community company and not of the fuel company, which were designated as maxima. The court said:

> "Whether the rates of the fuel company were fixed or merely maxima is not necessary to decide."

The rates set out in Section V of the ordinance of June 13, 1930, were clearly not maxima rates. But even if they could be assumed to be maxima, it does not follow that respondent, where it charged such rates only and no higher than those rates, can be forced to make retroactive reparations. Said Section V rates having been prescribed after a hearing and having been duly authorized can not be upset *per stirpes ab initio* and abrogated so as to entitle petitioner to hark back to the very inception of said rates and upset them initially, root and all.

The facts were that a schedule of rates for application in Texarkana, Texas, had been passed by the city council of Texarkana, Texas, on March 13, 1923. After making very substantial improvements in the system, respondent attempted to secure an increase in gas rates in Texarkana, Texas, by filing an application for change in rates in the first part of 1930. On this application the city council held hearings but denied the application. Respondent then appealed to the railroad commission of Texas. The railroad commisison came to Texarkana and conducted hearings upon the appeal. In the meantime the

city council of Texarkana, Texas, opened new proceedings in the city council and held further hearings, which resulted in the city council's prescribing the schedule of rates which is set out in Section V of the ordinance of June 13, 1930. The railroad commission approved the new schedule. Later, on June 17, 1930, respondent accepted the ordinance of June 13, 1930, which embodied the new schedule and has at all times since charged those rates and those rates only. (R. 124, 125). Respondent pleaded that Section V prescribing said rates as aforesaid was in pursuance of the power of the city council over rates.

As no change in rates has been made in Texarkana, Texas, since June 13, 1930, it is submitted that the rates prescribed in Section V of the ordinance of June 13, 1930, are not subject to retroactive reparation and are not subject to reduction until after the city council in due course of procedure shall have made a rate-reducing order that is valid.

(D)

Cases cited by petitioner not in point.

Petitioner cites and quotes the case of *Dallas Railway Co. v. Geller* (1925) 114 Texas 484, 271 S. W. 1106. This case lends no color to the claim that although the city has no power to contract as to rates so as to bind the city, it does have power to contract as to rates so as to bind the company, nor does it lend color to the claim that the city can surrender or delegate its regulatory power in whole or in part. This case, in holding against the plaintiff who sought to enjoin the company from raising its rates to 6c from the alleged contractual 5c rate designated as the max-

imum fare in the franchise, sustains the position of the company in the case at bar. The court at p. 1107 said:

> "With this construction as limited and defined in the case last cited we are in accord. We incline to the view that the Honorable Court of Civil Appeals intended to go no further than to hold in accord with the above mentioned case of *San Antonio Tr. Co. v. Altgelt* (Tex. Civ. App.) 81 S. W. 106, in which this court refused a writ of error, and with the Supreme Court of the United States in the same case (200 U. S. 304, 26 S. Ct. 261, 50 L. Ed. 491), and the other cases cited above, wherein it was held that a rate schedule as in this case is subject to legislative control within the limitations of the Constitution and the laws which control the rights of property. This holding in this case in no wise contradicts the holding in the case of *Mayor et al. v. Houston Ry.*, 83 Tex. 548, 19 S. W. 127, 29 Am. St. Rep. 679.
>
> "The right or power to **further control or regulate the grant in regard to the rate schedule** is a reservation to the municipality, and not an inhibition to contract; and where a franchise is accepted by a grantee, this reservation provided in the law becomes a part of the contract."

The rate schedule in Dallas was held to be in the legislative control, which had been delegated to the city; the plaintiff was held to have no right to prevent the company from raising its rates above the alleged contract rates, and the rates were held reserved under the regulatory power of the city.

As to certain matters other than rates, the city and the company can make a binding contract in granting franchises; but in the *Geller Case* it was held that rates remained subject to the regulatory power; that they were

subject to revision from time to time by the council which was vested with that legislative function; and that of this function the city could not divest itself. While the "power to further control or regulate the grant in regard to the rate is a reservation to the municipality", it "was not an inhibition to contract." The distinction, the court pointed out, was:

> "This holding in no wise contradicts the holding in the case of *Mayor et al. v. Houston Ry.*, 83 Tex. 548, 19 S. W. 127."

In this *Houston Railway Case*, it was held that, as to certain provisions, which were quite different from rate provisions, the franchise was a binding contract which could not be subsequently impaired by the authorities of the city of Houston; that the city of Houston was bound by contract not to interfere with the company in laying a track on one of the streets of the city.

The court in the *Geller Case* accordingly affirmed the district court in dismissing the suit to prevent the railway from raising its rates above the franchise rates which were alleged to be enforceable as contract rates insofar as the company was concerned. The net result was that, although as to certain conditions and provisions a franchise could be a contract, as to rates it could not be a binding contract, as the power to regulate was reserved; and that where a franchise is accepted by a grantee, "this reservation provided in the law becomes a part of the contract."

The result of the authorities is that the power and duty of the council to fix reasonable rates for the purpose of protecting the utility's property from confiscation

through inadequate rates is just as surely a part of the police or governmental power and duty as is the power and duty to lower the rates to protect the consumers, if the rates are too high. The city cannot bind itself not to regulate rates, nor can the company bind the city not to regulate rates; neither party can bind the city not to regulate rates; the statutory power and duty of the city to regulate rates in accordance with the requirements and methods laid down in the statutes cannot be impaired or altered except by another statute; its power to prescribe reasonable rates is a duty and power of which the city cannot divest itself and of which the company cannot divest the city. It is reserved by law regardless of what the city does or what the company does. Any attempt of the city to bind the city or the company not to recognize, follow, obey or call upon governmental power is fruitless, since said power is inalienable, and the city government is under a duty to exercise its police power, following the methods prescribed for its exercise, including all others. If the city could divest itself of the governmental power to protect the company against confiscation, it would be tantamount to a surrender of its governmental function. This position is in entire harmony with the *Geller Case*.

Petitioner states that after the company had filed its original brief in the *Geller Case*, the case of *Uvalde v. Uvalde Elec. & Ice Co.*, 250 S. W. 140, was handed down, and that it was then urged as a decision that a city with the power to regulate rates could not make a contract as to rates which would bind either the city or the company, which is precisely what the *Uvalde Case* held. Moreover, the court in the *Geller Case*, did not disapprove, but, sus-

tained the position of the company, protecting the company in raising its rates above the rates to which the company was alleged to have been bound by contract. No criticism or qualification whatever was made of the *Uvalde Case*. On the contrary the *Uvalde Case*, as shown in subdivision (b), supra, has been frequently cited and approved in many cases, one of the late cases being *Texas Gas Utilities Co. v. City of Uvalde*, 77 S. W. (2) 750, 752.

The city of Dallas, under special charter, and the city of Uvalde, under the general laws, both had the power to make franchise contracts with utilities. In fact, franchises have been made in all cities in Texas incorporated under the general laws. In cities having rate regulatory power under special laws, as well as in cities having such power under general laws, such as Uvalde, there is the limitation that, as to rates, the city has no power to make a contract which is binding on either party. This matter can in no instance be surrendered but is reserved under the police or governmental power of regulation in accordance with the statutory requirements. The *Geller Case* so held.

The attempted distinction, between the *Uvalde Case* and the *Geller Case*, on the ground that the city of Dallas had been **expressly authorized** to grant franchises, is unsound because Uvalde also had the same power to grant franchises. Neither in Dallas nor in Uvalde does the power to grant franchises include the power to contract as to rates, or to make the rates in another state and jurisdiction control and govern the Texas rates. The same reasons, upon which the *Uvalde Case* and the *Geller Case* are founded, are controlling in the case at bar.

This case at bar is even stronger because the special statute applicable to Texarkana, Texas, mandatorily requires the regulatory power to be specifically stipulated in the very terms of the franchise; the franchise, if it should so expressly stipulate, is required to be read, just as though the stipulation was expressly written therein.

The case of *Knoxville Water Co. v Knoxville*, 189 U. S. 434, cited by petitioner, was rendered by Mr. Justice Holmes. The holding was that the city was not bound by the asserted contract, but could reduce the rates. There was no holding that the company was bound by a contract as to rates; that issue was not involved. The company had not applied to increase the rates, but was insisting upon the rates as a contract. The court held that the rate contract was not valid, did not prevent a reduction. Petitioner is the party undertaking to abrogate the regulatory power exerted in Section V of the ordinance of June 13, 1930, to divest it in an unauthorized manner, to delegate it to an extra-territorial body, and to abdicate its own inalienable functions.

Petitioner cites the case of *Texarkana Gas & Elec. Co. v. City of Texarkana* (Tex. Civ. App.) 123 S. W. 213. In that case the Court of Civil Appeals set out that the city had existed as a municipality under the general laws of the state and had granted a franchise; that in 1907 the state statute granted to the city a special charter; that the city thereafter passed an ordinance to regulate the placing of poles and to provide for a license and license fee upon each pole. It was held that regulation of the placing of poles

was valid, but that the license and license fee provisions were invalid. The court said:

> "As a defense the appellant alleged and proved upon the trial that some years before the granting of the special charter to the city of Texarkana, and while the latter was existing as a municipal corporation under the general laws of the state, it obtained from the city a franchise or right which authorized it to place and set its poles on the streets and alleys of the city, and that by virtue of that authority it had placed and set its poles on the streets and alleys, and was using and maintaining them in that position at the time the ordinance above mentioned was passed, and that the appellant was then and is now acting by virtue of the original franchise referred to. It was also shown that in the grant of the franchise claimed the terms required the appellant to furnish free of charge electric lights for use in the city hall, fire-house, and jail, and to furnish electric street lights at certain prices agreed on, and that no other license fees were therein exacted." (p. 214).

Petitioner, referring to that part of the opinion relating to free electric lights for use in the city hall, fire house and jail, contends that the court held that the company had to furnish free service. That question was not in issue in the above Texarkana case, but it was involved in the *Uvalde Case* (Com. of Appeals, 250 S. W. 140). In this latter case adopted by the Supreme Court of Texas, the Commission of Appeals held, that, as to what the city shall pay for street lights, the regulatory power must be exerted upon application; that the alleged contract was not valid; that the company could raise its rates, if confiscatory.

The court in the *Texarkana Case*, 123 S. W. 213, further said:

> "In granting the right, or franchise as it is called, the city can impose conditions or charge a fee for the privilege given, which the applicant can accept or reject at his pleasure; but, having accepted it, he takes the franchise subject to the conditions imposed, and must pay the consideration enacted. *3 Abbott, Municipal Corp., para. 908.*"

This statement refers to conditions, other than a condition as to rates; it is immediately qualified by the statement that "such transactions have many of the elements of a contract",—not all of them however, because only "within certain limitations" can "the city part with its police power." The city cannot surrender that portion of its police power, the exercise of which is essential to the general welfare in protecting personal and property rights." It cannot surrender those that "involve the surrender of its necessary governmental functions." As the state statute in force in Texarkana expressly reserves the rate regulatory power from franchise contracts, how can it be said that the city is authorized to violate it as a condition of granting a franchise?

When the state statute in force in Texarkana forbids the city to surrender any part of it governmental power over rates, it is vain to contend that, under certain conditions, the city can surrender part of said regulatory power and duty; that its governmental power can be surrendered insofar as concerns the company. Such partial surrender is claimed on behalf of the consumers, but the city is forbidden to absolve itself, and the company cannot bind itself or the city to override the state statute; the

power and duty of the council is not to be abridged, suppressed, suspended, surrendered, or placed in abeyance.

In the statute pertaining to Texarkana, the rate regulatory part of the police power is in effect made "essential to the promotion of the general welfare in protecting personal property rights"; the statute is mandatory. The rate regulating power must be expressly excepted in the very terms of all franchises and, if any franchise should not contain such express stipulation, it shall be considered and read just as if such stipulation were expressly written therein.

No qualification authorizes the city to surrender its power and duty. The governmental power and duty is not limited to exertion only in behalf of consumers. The city, the consumers, and the company cannot, jointly or severally, contract what the sovereignty of the state prescribes shall be reserved.

As to other matters, there can be contractual relations and binding terms and conditions, but since rates have been excepted and excluded by statute, franchises cannot contract them. The court in the *Texarkana Case*, 123 S. W. 213, then said:

> "The terms upon which the right was granted fixed **only the contractual relations** of the parties; and the easement—that which the city could grant—became vested."

Thus the city could grant the franchise and certain terms of the franchise were binding as it has many elements of a contract, but "the city could not surrender that portion of its police power the exercise of which is essen-

tial to the promotion of the general welfare in protecting . . . property rights." Since rate regulating and prevention of confiscation is protecting property rights, the city of Texarkana in the case at bar has no power to surrender or qualify its regulatory power.

The case of *City of Terrell v. Terrell Elec. Light Co.* (1916) by the Court of Civil Appeals, 187 S. W. 966, cited by petitioner was not a rate case and does not sustain petitioner's contentions. Even if it did it would not be proper to follow it in view of the cases by the higher Texas Courts, and in view of the *Houston Case*, 259 U. S. 312 (1922) and the other cases cited in this brief. The court held that certain provisions were not conditions. Certainly Section IX in the case at bar was not a condition.

Petitioner cites the case of *Athens Tel. Co. v. City of Athens* (1914), 163 S. W. 371, by the Court of Civil Appeals on a temporary injunction. The court said the city was free to regulate the local telephone business, and yet the utility in proposing to increase its rates without so much as applying to the city for authority to do so, was totally ignoring the regulatory power. Another appeal was taken from the final judgment (1916), 182 S. W. 42, to the Court of Civil Appeals. It was pointed out that the city had no regulatory power over telephone rates. Neither did any other body have such regulatory power. It was purely a matter of contract.

Petitioner cites the case of *Greenville Tel. Co. v. City of Greenville* (1920), 221 S. W. 995, by the Court of Civil Appeals. It is not shown that any regulatory body had been vested with regulatory power, but the franchise

contained such a provision. It is universally settled in Texas that a franchise cannot vest a city with regulatory power. But the telephone company in the *Greenville Case* did not so much as attempt any administrative relief. On the other hand, if there were no regulatory body, it is settled that the franchise provisions will prevail.

Petitioner cites the case of *Texas Tel. Co. v. City of Mart* (1920) 226 S. W. 497, by the Court of Civil Appeals. The court clearly pointed out that the city had no regulatory power, and that the franchise will prevail under such circumstances, though not in that case. There is no holding that a city or a company can make a valid contract as to rates where the city has regulatory power, nor that such an attempt would be paramount to the regulatory power, nor that it could delegate or abdicate such power to another city.

The case of *Fink v. City of Clarendon*, 282, S.W. 912 by the Court of Civil Appeals, cited by petitioner, was a telephone case in a town incorporated under general laws. This case is different from the case at bar, in that the city of Clarendon, being under 2,000 population, had no power to regulate rates. The railroad commission likewise had no power to regulate telephone rates then or now. In such situation it was held that the city of Clarendon had power to grant the franchise and agree upon rates, which were binding upon both the city and the company, until such time as the legislature should regulate or authorize regulation of the rates. This case is founded on the case of *Southern Utilities Co. v. Palatka*, 268 U. S. 232, which expressly holds that it is not incon-

sistent with the *San Antonio, Chariton,* and *Ortega Cases.* The *Fink Case* is quite different from the *Uvalde, Geller, San Antonio, Houston* and *Los Angeles Cases,* and from the case at bar; in these cases, said cities were delegated the power to regulate rates, as well as the power to make franchise contracts. If such cities could contract as to rates, it would suspend or surrender its regulatory power in violation of the law. The court cited the *Uvalde Case,* 250 S. W. 140, by the Com. of Appeals (judgment affirmed by the Supreme Court of Texas) but did not disapprove of it in any respect.

The old case of *Cleburne Water, Ice & Lighting Company v. City of Cleburne,* 1896, (Tex. Civ. App.) 35 S. W. 733, decided 42 years ago by a Court of Civil Appeals, is strongly relied upon by petitioner. The facts were that the operator of the utility undertook to raise its rates in the city of Cleburne without even applying to the city council of Cleburne. The city contended that the operator was bound by the existing rates until its city council should authorize different rates.

> "Hence the provision authorizing the city council to fix rates, with the limitation as to other cities, which limitation was for the protection of Moss against the fixing of rates by the council at less than those of other cities of like character in the state. He evidently was willing to abide by the Bell rates, but, when the council undertook to change, it would not go below other cities of like size and population." (p. 735).

If the laws in force at that time were like those of the present times, which they are not, and if the city of

Cleburne had regulatory power like that now in force in Texarkana, Texas, which it did not have, the above excerpt is clearly unsound. Cities in Texas having regulatory power are not bound by a contract as to rates; this is admitted in petitioner's brief. However, the *Cleburne Case* assumes that the contract as to rates was valid and binding alike on both the city and the utility. No issue was raised as to the validity of the contract. The issue was merely one of intention and interpretation of several instrument. The powers of the city of Cleburne are not shown, though petitioner asserts that the city of Cleburne reserved a right and privilege it did not already have. As the city council had not been called upon by the operator for changed rates, the franchise rates were the proper rates, whether or not the city council of Cleburne was vested with regulatory power. If the 1896 opinion of the court of civil appeals could be interpreted as contended by petitioner it would have little weight as a precedent today, either under like facts and like laws, or under different facts and different statutes. The important recent cases in the higher courts of Texas do not so much as cite the *Cleburne Case*.

In 1896 there was no statute vesting the city council of Cleburne, or any other body, with regulatory power conditioned that the city council shall not prescribe any rate which will yield less than 10% per annum net on the physical properties, equipment and betterments (Art. 1119 originally enacted in 1907, relating to cities of over 2,000 population incorporated under general laws of the state), nor a statute directing that a city having regulatory power under a special charter shall base rates upon the

fair value of the property of the utility (Art. 1124 passed in 1921); nor that the franchise should expressly reserve the regulatory power from all franchises.

If the Cleburne opinion were to be construed to hold that a franchise ordinance was a contract as to rate, valid as to both the city and the utility, preventing a city from exercising its regulatory power to fix rates lower than those in certain other cities, the opinion would be clearly unsound.

It does not appear however that the opinion even so much as referred to an issue as to whether a city having regulatory power may make a valid contract as to rates; nor the issue whether a city, after a hearing fixing a rate can validly contract that the rates specifically fixed by it shall vary according to future contingencies, or conditions in another city; nor was there any discussion of the settled principle that a city having regulatory power by state statute must fix rates in the method laid down by the statute and not otherwise.

Petitioner cites the case of *Southern Utilities Co. v. City of Palatka, Florida*, 268 U. S. 232, but the court expressly stated:

> "There is nothing in this decision inconsistent with *So. Iowa Elec. Co. v. Chariton*, 255 U. S. 539; *San Antonio v. San Antonio Pub. Serv. Co.*, 255 U. S. 547, and *Ortega v. Triay*, 260 U. S. 103."

The point is that Palatka, Florida, had no regulatory power. The *Los Angeles Case* (1929) 280 U. S. 145, discussed in respondent's brief, is clearly the applicable rule in the case at bar. The law applicable in Florida un-

der circumstances similar to those in the case at bar is shown in *Ortega Co. v. Triay*, 260 U. S. 103, quoted by respondent, supra.

In the case of *Peoples Gaslight & Coke Co. v. City of Chicago*, (1904), 194 U. S. 1, cited by petitioner, there was no issue of confiscation. The issue was whether the city had the right to regulate and the court held it did. The court said the Act of 1897 was not intended to fix and did not fix a rate unalterable by either party. It is a hornbook law that the state under the circumstances of that case could regulate rates, and could vest the city with the regulatory power. The company undertook to enforce an asserted rate contract in suppression of the regulatory power, which of course it could not do. There was no attempt by the company to raise its rates and no issue as to what the situation would have been if such attempt had been made.

Petitioner cites the case of *Cedar Rapids Gas Light Co. v. City of Cedar Rapids, Iowa* (1912), 223 U. S. 655. The significant quotation on page 53 of petitioner's brief is that the regulatory power was not to be abridged by ordinance, resolution, or **contract.** Mr. Justice Holmes said:

> "The state court assumed that there was no contract in the case."

and

> "It would require a very clear case to warrant the reversal of the decree of a state court, which, though final in form, merely postpones a decision upon the merits for further experience",

and that the return would be over 6 per cent.

When the question in Iowa came up later in a real way, the U. S. Supreme Court decided it in a real way in a leading case per Chief Justice White. See *Southern Iowa Elec. Co. v. Chariton* (1921) 255 U. S. 539, quoted and strongly relied upon by respondent, supra. The *Los Angeles Case* (1929), 280 U. S. 145, is also quoted and strongly relied upon by petitioner.

The case of *Henderson Water Company v. Corporation Commission*, 269 U. S. 278, cited by petitioner is not at all similar to the case at bar. The city had no regulatory power and the laws of North Carolina are not entirely different from those of Texas.

Petitioner cites two Arkansas state cases, *Bolinger v. Watson*, 187 Ark. 1044, 63 S. W. (2) 642, and *Wiseman v. Phillips* 191 Ark. 63, 84 S. W. (2) 91, but the laws of Arkansas as to the validity of its legislative acts and constitution are surely different from and not governed by the defined powers and limitations by the Texas statute of the city of Texarkana, Texas.

Judge Hutcheson, the organ of the court below, is a Texas lawyer, a distinguished member of the bar of that state prior to his elevation to the bench of the United States District and Court of Appeals, thoroughly versed in and familiar with the jurisprudence of that state. The opinion purports not to depart from the local law of Texas but to exactly follow and be ruled thereby. It is not likely that it did not achieve its avowed purpose or that it so signally failed in its statement and construction of the applicable Texas decisions.

Judge Hutcheson was the organ of the court in the case of *City of Seymour v. Texas Elec. Serv. Co.*, (1933), 66 Fed. (2) 814, cited in the opinion under review, R. 428. Judge Hutcheson also was thoroughly familiar with the case of *Community Natural Gas Co. v. Natural Gas & Fuel Co.*, by the Texas Court of Civil Appeals (1930), 34 S. W. (2) 900, for he cited it in his opinion at 66 F. (2) 816.

And yet petitioner in effect contends that he misapplied said two cases and cites them to upset the decision below, which of course they do not. The *Community Gas Co. Case* does not disapprove, but cites the important *Uvalde Case*, 250 S. W. 140. Petitioner significantly omits from its quotation the following sentence in the *Community Natural Gas Company Case:*

> "Whether the rates of the fuel company were fixed or merely maxima is not necessary to decide." (p. 902).

Petitioner also omits the following:

> "Rate making is a legislative, not a judicial, function (Missouri-Kansas & T. R. Co. of Texas v. R. R. Comm. (Tex. Civ. App.) 13 S. W. (2) 489), affirmed (Tex. Com. App.) 13 S. W. (2) 679; and the rate-making power here involved is vested exclusively in the city of Brownwood, with the right of appeal to and trail de novo by the railroad commission, and a further limited right of review by the district courts of Travis County (R. S. arts. 1119, 6058 and 6059). The controversy between the two competing corporations is one which addresses itself in the first instance to the city of Brownwood, and not to the courts. Under the holding in the Uvalde Case the city is not only vested with the power, but is charged with the duty of fixing just and reasonable rates, both in the interest of the contending utilities and

in that of the consumers. As was said in Economic Gas Co. v. Los Angeles, 168 Cal. 448, 143 P. 717, 718, Ann. Cas. 1916A, 931; 'It is contended that the city's police power extends only to the protection of the consumer, But "regulation" involves more than that. It includes the power to prevent ruinous competition among the producers as well as unjust charges to the consumers.'" (p. 903).

Petitioner quotes a part of the opinion relating merely to the Community Company. The case is entirely different from the case at bar and does not support petitioner's contentions. Neither does the *Seymour Case*, which was written by Judge Hutcheson, support petitioner.

Petitioner also cites the case of *Parsons v. City of Galveston*, (1935) 125 Tex. 568, 84 S. W. (2) 996. To show in what high regard for knowledge of Texas law Judge Hutcheson is held, it is noted that this high court quoted Judge Hutcheson at p. 998 and again at p. 999 in the *Seymour Case*, and also at p. 1000; and said:

"In considering cases dealing with the regulation of rates of public service utilities operating under franchises, it must be remembered that such utilities are operating under certain vested rights obtained through their franchises. While their rates are subject to regulation, they have obtained the right to carry on their business and occupy the city's streets for such purposes under a franchise right to do so, which cannot be destroyed through means of fixing rates whether maximum or minimum, the effect of which is to confiscate their property by making it impossible to carry on their business with hope of a reasonable return. In other words, the power to regulate their rates may be qualified or limited by their vested right to conduct their business under

their franchises. That, as the authorities cited above establish, is not true as to persons engaged in a business such as that of plaintiffs in error, who have no vested rights in the use of the streets for their business, and hence the privilege they seek is not protected from destruction. They stand upon an entirely different footing from the utility possessing rights under a franchise, consequently the result of a rate regulation upon their privilege to use the streets does not have the same legal effect as it would have were the vested rights of a public service utility involved." (p. 1001).

(E)

The city council in taking jurisdiction and in holding hearings on the merits of the rates, abrogated and waived Section IX.

Respondents on November 3, 1933, filed application for increase in rates (R. 285). The council stated that it did not waive the provisions of the francise contract and that it entered into the hearing and considered the evidence for the purpose of determining whether or not the facts were such as should cause the council to consider the provisions of the franchise agreement to be so oppressive that the council should in equity and good conscience consent to waive the same (R. 287). The council made findings of fact (R. 287-319), and again stated that it refused to waive and still insisted upon the provisions of the franchise agreement (R. 319-320), and would not then change the rates, but that it would a year later enter upon a hearing for the purpose of determining whether or not it would change the rates to 40c. (R. 321). Respondent pleaded the full facts and they are to be considered as the facts in

the case at bar as they were confessed by petitioner's motion to strike out.

Section IX was pleaded by respondent to be unenforceable and invalid on numerous grounds, including the same grounds set forth as to the invalidity of Section VIII-A (R. 156), one of which is the defense of waiver of the city council by its actions in calling upon respondent to go through a complete rate case, and in having full hearing, and acting upon respondent's application, etc., consuming great time, effort and expense of respondent, and in holding itself out as willing to consider the matter upon its merits and in considering the matter but denying it for the reasons given. (R. 159).

This ground is based on the opinion of the United States Supreme Court in *Railroad Commission v. Los Angeles R. Corp.*, 280 U. S. 145 at 156, *et seq.* The company in that case applied for increased rates and although the commission granted a small increase, it never went into effect and was not accepted by the company. The company dismissed its application. Thereafter, the company filed another application. The commission took jurisdiction, the United States Supreme Court held as the second main point in the case that "assuming the fares were established by the franchise contracts, we are of the opinion that such contracts have been abrogated". (R. 156).

It is submitted that even on the assumption that Section IX were ever a valid contract as to rates, the actions of the city council are the material circumstances on which to judge the effect of what it did, and that, by those actions, the city council abrogated and waived Section IX.

(F)

Asserted discrimination does not make Section IX valid.

Petitioner takes the position that Section IX should be held valid on its allegation that it is a "non-discrimination" agreement. The non-discrimination claim is unsound in fact as it is in theory when it is seen that what petitioner really seeks is to enforce discrimination and to compel respondent to furnish gas at confiscatory rates. Petitioner's argument is in effect that it matters not how unjust the rates may be, how insufficient the compensation given the company for gas service, that, nevertheless, by virtue of Section IX, Texarkana, Texas, should be given an advantage over other Texas cities similarly situated otherwise, but not having the same franchise provisions.

Respondent denied there was any unlawful discrimination. As petitioner's motion to strike out was sustained and respondent's pleadings stricken, it is to be taken that the allegations of respondent set out the correct facts. It should be stated here that petitioner's claim of discrimination was not sustained by either the district court or by the Court of Appeals.

However, petitioner argues that discrimination is a ground on which this court should enforce Section IX and the city's interpretation thereof, adjudge reparations, and reduce the rates in Texarkana, Texas, below those that were lawfully prescribed by the city council of Texarkana, Texas, in Section V of the ordinance of June 13, 1930.

As a matter of fact, the difference in the rates charged in the two cities for the period under review has been in favor of Texarkana, Texas, and against Texarkana, Arkansas. While for two and one-half months the rates in Texarkana, Texas, were for a short temporary period somewhat higher than those in Texarkana, Arkansas, there was a period of nearly three years during which the rates in Texarkana, Texas, were considerably lower than those in Texarkana, Arkansas. Not on the merits or reasonableness of the rates, but on technicalities as to procedure in litigation in Arkansas, respondent temporarily charged in Texarkana, Arkansas, rates which were somewhat lower than those that were charged in Texarkana, Texas, in accordance with Section V of the ordinance of June 13, 1930, in that city, but this situation lasted for only two and one-half months from December 1, 1933, to February 16, 1934. This short temporary period in Arkansas ended on February 16, 1934, the date on which a temporary injunction was issued in a new suit which had been filed in Arkansas as soon as legal procedure would permit. On February 16, 1934, new rates (R. 154) were placed into effect in Texarkana, Arkansas, which were considerably higher than the Section V rates in Texarkana, Texas. These new rates continued in effect in Texarkana, Arkansas, from February 16, 1934, to December 4, 1936, nearly three years. The difference in rates did not constitute unlawful discrimination, but if it were discrimination, it was in favor of Texarkana, Texas, for this period of nearly three years, and that city could hardly complain. In December, 1936, the district court in Arkansas in part dissolved the injunction and in part made it perpetual. As to the part dissolved, respondent took an appeal to the Eighth Circuit

Court and secured supersedeas as to reparations. As part of the injunction was dissolved, respondent pending the outcome of the appeal adopted in December, 1936, in Arkansas, rates which were lower than the Section V rates in Texarkana, Texas. The city of Texarkana, Texas, admitted:

> "So far as the rights of the consumers in Texarkana, are concerned, the court cannot now pass upon them from and after February 16, 1934. **If the gas company is successful in its Arkansas suit, then there will have been no discrimination from and after February 16, 1934."**

On the other hand, if respondent should lose its appeal in Arkansas, petitioner asks that it be permitted to go back and upset, the rates prescribed in Texarkana, Texas, in Section V of the ordinance of June 13, 1930, from the very day it was passed—in other words, it would be abrogated **ab initio, without ever having had any operative force whatever even for one instant of time** and petitioner seeks to recover $150,000.00 reparations for the past eight (8) years. Surely no such uprooting of the ordinance and consequent catastrophe to respondent is sustainable.

Petitioner seeks to have the court put into force in Texarkana, Texas, the Arkansas rates, which are confessed, by the motion to strike out, to be confiscatory. In the face of the unvarying jurisprudence that federal courts will not make, find, or establish rates, plaintiff is asking the court to establish these Arkansas rates in Texarkana, Texas, and to award reparations.

The argument of the city that the prescribed rates in Texarkana, Texas, are discriminatory is in the face of

the leading cases in Texas, which are those cited by Judge Hutcheson (in the *Eagle Cotton Oil Company Case*, 51 F. F. (2) 446): *Missouri, Kansas & T. R. Co. v. Railroad Commission* (Tex. Civ. App.) 3 S. W. (2) 489, and *Producers' Refining Co. v. Missouri, Kansas & T. R. Co.* (Tex. Com. App.), 13 S. W. (2d) 679. The opinion in the Court of Civil Appeals, 3 S. W. (2d) 489, by Chief Justice McClendon, was described in the Commission of Appeals as "the able opinion". The facts were that the railway company opposed reparations claimed by shipper on account of alleged discrimination, based on the ground that specified rates from certain origin points of shipment in Texas to certain delivery points in Texas, which had been until 1921 the same as the rates from the same origin points to the delivery point at Shreveport, Louisiana, were reduced to 25c by the railway company insofar as concerned shipments to Shreveport, but were not reduced insofar as concerned shipments to the Texas points. The Railroad Commission contended, that while it was undoubtedly a recognized principle of rate making that a mere difference in rates does not always constitute an unjust discrimination, these exceptions must be based on sound reasons if they are free from discriminatory charges; that the railway company violated the law prohibiting unjust discrimination to the extent that the rates to the Texas delivery points exceeded 25c; and that reparations based on such rate were recoverable. The position of the railway company was sustained by the Court of Civil Appeals, the Commission of Appeals, and the Supreme Court of Texas. The rates complained of, having been prescribed by the Commission and not having been attacked as provided by law, were held to be binding on both the carrier and the shippers, and not violative of, but in conform-

ity to, the rates fixed under the law. The rate-making power having been vested in the Commission, and the carrier having charged only the rates fixed by the Commission, reparations were denied.

> "As tersely expressed by Associate Justice Brown in *Railroad Commission v. Weld & Neville*, 96 Tex. 405,; 73 S. W. 532:
>
> > 'The Railroad Commission Law deprived railroad companies of the power to make rates and conferred that authority upon the commission. . . .'" (3 S. W. (2) 493).
>
> "In the state act, as pointed out above, **the rate-making power is taken away from the carrier altogether and vested exclusively in the commission.** . . ." *(Id. 495).*
>
> "The holding of the commission that the Wichita Falls rates, **though approved by it, were in fact made by the carriers, because made upon their application, is unsound. Rates, to be effective under the Texas act, must be made by the commission, and are inoperative other than by force of the commission orders.**" *(Id. 496).*

This case was affirmed by the Supreme Court of Texas, 13 S. W. (2) 679, 682.

Squarely on this point is the following quotation of *Texas Gas Utilities Co. v. City of Uvalde* (San Antonio Court of Civil Appeals, Dec. 24, 1934), 77 S. W. (2) 750:

> "Article 6057 expressly provides that **different rates may be charged in different places,** and the fact that appellant had a different rate at La Pryor or Carrizo Springs, or some other city, would not give a district court the legislative power of fixing rates for the city of Uvalde." (p. 751).

A mere difference in rates between two cities similarily situated does not in itself justify the conclusion that one is too high and one is too low. Particularly is this true where the cities involved come under the laws of two separate and different sovereignties. The comparable factor which must be considered in making the comparison may be differently viewed by the rate making bodies of the two sovereignties concerned. The differences in taxes, governmental relations, operating conditions in the two cities will cause a wide difference in rates. Few conditions and circumstances are the same as between the two cities of Texarkana, enumeration of the differences being set out at R. 153. Each city must be treated as a separate unit for rate making; losses at one city can not be made up by increased earnings at another. *Wabash Valley Elec. Co. v. Young*, 287 U. S. 488. Respondent contends that petitioner is not entitled to inflict the loss that would be suffered at Texarkana, Texas, under the rule petitioner contends for. Such a rule would not be good law, would be a frightful distortion of public policy and is so unconscionable as to lack even good morality.

In *Smyth v. Ames*, 169 U. S. 466, the United States Supreme Court, in answer to the assertion that local rates in Nebraska were higher than in Iowa, pointed out, that on an issue of discrimination between rates in Nebraska and Iowa, the necessary factors were the kind and amount of business and the cost thereof, which varied in the several states:

> "The volume of business in one state may be greater per mile while the cost of construction and maintenance is less. Hence, to enforce the same rates in both states might result in one great injustice,

> while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two states are of little value, unless all the elements that enter into the problems are presented . . . Hence, a mere difference of 40% between the rates in two states is of comparatively little significance." (p. 540).

There is a review of this subject in *Ft. Smith Light & Traction Co. v. City of Ft. Smith, Arkansas*, 202 Fed. 581, 589, 590.

It is argued by petitioner that part of the majority opinion of the Court of Civil Appeals in the case of *Dallas Power & Light Co. v. Carrington*, 245 S. W. 1064, quoted supra under sub-division (B), supports its claim to put the Arkansas rates into effect in the city of Texarkana, Texas, and to recover reparations on the ground of alleged discrimination: whereas no reparations were recovered in that case and the issue of discrimination in the *Carrington Case* is significantly different from that in the case at bar, and the facts in the case at bar are confessedly different. The city of Highland Park, "having the power by general statute to regulate public utilities, had not granted any franchise or passed any legislation relating to light service or rates." (p. 1047).

> "On June 1, 1920, appellant divided into districts the territory supplied by its plant, making the town of Highland Park one unit and the city of Dallas another. It continued to supply the city of Dallas at the old rate in accordance with the terms of the franchise, but it raised the rate in Highland Park." (p. 1047).

No ordinance was passed by the city council of Highland Park until October 14, 1920, when it enacted an ordi-

nance adopting the same rates that were effective in Dallas and that had been effective in Highland Park from 1917 to June 1, 1920. The court, after holding this ordinance to be void, took up the issue of discrimination and found that the old 6c rate was still voluntarily continued in effect in Dallas and in Munger Place, Jimtown, Oak Cliff, Oak Lawn, Mt. Auburn, and Sunset Hill, while Highland Park was charged an average of about 10½c, that it cost no more to supply its citizens with electric current than it cost to supply the other places just named, that the conditions in Highland Park were similar in respect to distance, number of feeders, and cost, that the facts in that case showed discrimination. It is noted that the increased rates were purely company made rates and that they were put into effect in Highland Park by the utility company without so much as making any application whatever to the city council of Highland Park in which was vested the regulatory power, that the company had no authorization to increase its rates in Highland Park, but that its action was opposed. The court further held as a fact that it was possible for the company to treat all users of the plant equally and at the same time be sufficient to produce 10% on the actual cost as required by statute, that the facts in the case constitute discrimination on the part of the company against Highland Park, and that the 10% return could be made without discrimination. (P. 1050). On the issue of discrimination there was a dissenting opinion by Dohoney, Special Judge. (p. 1050). He found the evidence to be that the 6c rate did not produce sufficient income in Highland Park, that appellant had the right in view of the facts disclosed by the record to classify its consumers and charge different rates to each class as they were not similarly

situated, and that the evidence did not show discrimination. (p. 1052). A writ of error granted in that case was dismissed. (p. 540, Vol. 28, Texas Digest of 1936, published by West Publishing Co.).

Where there are different regulatory bodies, it is very difficult, if not impossible, to secure uniformity of rates even under identical facts, as strikingly illustrated by the United States Supreme Court in *Mitchell C. & C. Co. v. P. R. R. Co.*, 230 U. S. 247 at 255, 256:

> "The necessity under the statute of having such questions settled by a single tribunal in order to secure singleness of practice and uniformity of rate has been pointed out and settled in Abilene, Pitcairn, and Robinson Cases, and is referred to here because this record and that in Pennsylvania R. Co. v. International Coal Mine Co., just decided, furnish a striking illustration of the results which would follow if the reasonableness of an allowance could be decided by different tribunals. Both cases involve the payment of 18 cents a ton to the Altoona Company during the same period and for identically the same reasons. In both the plaintiff insisted that the payment was a rebate and the carrier that it was compensation for services rendered. In the International Case the judge treated the Altoona allowance as lawful and reasonable. In this case the referee found that it was a rebate, while the trial judge * * * held that it was a question of fact about which the evidence was conflicting and thereupon approved the referee's report. Treating it as a question of fact, there may have been sufficient testimony to sustain the finding in both instances, although the conclusion was **diametrically opposite.**" (pp. 255, 256)

Gas rates in Texas are unmistakably placed in the control of Texas regulatory bodies to be regulated in the

manner and methods prescribed by Texas statutes. The Constitution of Texas itself provides for prevention and punishment of "the demanding and receiving or collection of any and all charges, as freight, wharfage, fares, or tolls, for the use of property devoted to the public, unless the same shall have been specially authorized by law." (Art. XII, Section 4 quoted supra and at R. 168). In the city of Texarkana, Texas, respondent has at all times charged only the rates that were prescribed by the city council of Texarkana, Texas. These prescribed rates were mandatory and were the only lawful rates. However, respondent in 1933 applied to the city council of Texarkana, Texas, for change in rates, the same as the change that was applied for by respondent before the city council of Texarkana, Arkansas. And respondent has done all it could to secure the changes in each city. If rate differences in Arkansas for the short period during which rates were lower than in Texas, could be held to be discriminatory,

> "* * * **an alternative must be afforded.** The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both * * * The situation must be such that the carrier or carriers if given an option have an actual alternative." *Texas & P. R. Co. v. United States*, 289 U. S. 627, 650, 651 (1933).

Differences in rates do not constitute unlawful discrimination, but, assuming for the sake of argument that there had been any past discrimination by the company, **there is no law authorizing the recovery of refunds by gas consumers who have paid only reasonable rates.** In *Penna. R. Co. v. International Coal Min. Co.*, 230 U. S. 187, 200, a discrimination case, the shipper argued that, if it could

not recover as claimed, "the statute not only gives no remedy, but deprives the plaintiff of the right it had at common law to recover this difference between the lawful rate (that was paid) and the unlawful rate." The court said:

> "We are cited to no authority which shows that there was any such ancient measure of damages, and no case has been found in which damages were awarded for such discrimination." (230 U. S. 200),

and that the Interstate Commerce Act either first created a right in such case to recover damages, or removed the doubt as to whether such suit could be brought; that the English Courts had held a shipper who paid a reasonable rate to have no cause of action where the carrier had charged a lower rate to another; that no part of the payment of lawful rates can be treated as an overcharge; that having paid only the lawful rate, plaintiff was not overcharged, though the favored shipper was undercharged; that for such undercharge the federal statute provided a fine payable to the government and gave to other shippers the right to recover such damages, if any, as were proven and "known to the law"; that illegally making an undercharge to one shipper did not license similar undercharges to other shippers; that such other similar undercharges would be additional crimes, and, in the example cited, would give the shipper "a profit on the carrier's crime," or amount to ten times the first undercharge, or $35,000,00 on one undercharge of $3,500.00. Compare with the case at bar, where for refunds of $60,000.00 on the Arkansas side, the Texas side seeks some $150,000.00. The same rule obtains in *Texas Railroad Commission v. Weld & Neville* (Tex. Sup. Ct.), 73 S. W. 529, 532.

(G)

Section IX is invalid and not a bar to judicial hearing and relief from confiscatory rates.

That the rates set out in Section V of the ordinance of June 13, 1930, or any less rates, are and were confiscatory of respondent's property was one of the defenses pleaded by respondent in each of its answers and counterclaims, and was confessed by petitioner's motion to strike out. This plea, as set out in respondent's separate answer and counterclaim, covers 18 pages of facts (R. 189-207), all of which are confessed by petitioner's motion to strike out. When the matter was before the city council, lengthy hearings were held, its order denying increased rates consisting of 36 pages (R. 285-321).

This plea of confiscation was made in defense to petitioner's suits as well as in counterclaim. This was required in the second paragraph of *United States Supreme Court Rule No. 30*, providing that the answer "must state . . . any counterclaim" arising out of the transaction. Even if the counterclaim should be considered an independent suit in equity, it was proper to set it up under Rule No. 30. It appears however to come under the mandatory part of said rule. It also appears to be within the rule that when a court of equity has jurisdiction over a cause for any purpose, it will retain it for all purposes and proceed to a final determination of all matters in same. Pomeroy, 4th Edition, Sections 181, 231 et seq.; *Harr v. Pioneer Mechanical Corporation* (2 C. C. A., 1933), 65 Fed. (2) 332, 335.

The *Johnson Act* (28 U. S. C., Sec. 41, as amended, May 14, 1934, C. 283) does not apply to oust a defense to the subject matter sued upon and initiated by a city, nor does it apply to pending suits.

As conceded by petitioner's motion to strike out, respondent did everything possible to obtain administrative relief, though handicapped and interrupted by petitioner's suits. As respondent was and is suffering daily confiscation, it was at all events entitled to a judicial hearing, and yet petitioner is affirmatively enforcing confiscation.

That the regulatory power cannot be suspended or held in abeyance, as attempted to be provided by Section VIII-A is clearly shown in the authorities and argument. See particularly the case of *City of Uvalde v. Uvalde Elec. & Ice Co.*, 250 S. W. 140, and respondent's pleadings as to Section VIII-A set out from R. 158 to and including R. 162.

While petitioner at first pleaded Section VIII-A as valid, it later contended that it had become moot (R. 158). The district court held the section to be valid but moot, as more than a year passed after respondent gave notice (R. 236). If Section VIII-A should be assumed to be valid, it would be construed to mean that respondent, after said year's notice, would be entitled to increase its rates if the facts justified. (R. 159). And it is undeniable that the facts do justify, as they are well pleaded (R. 189-207) and confessed by petitioner's motion to strike out.

The only reason the district court denied respondent a hearing was on the ground that Section IX prevented it.

Even if Section IX should be held as contended by petitioner, it should not be permitted to subject respondent to confiscatory rates. By no means would it so subjugate respondent for all time.

Petitioner at p. 18 makes a misleading argument regarding a bond in the railroad commission; the reference (R. 367) given by petitioner is to the answer and counterclaim filed July 12, 1934, whereas this was amended by respondent's Separate Amended Answer and Counterclaim filed July 14, 1937, R. 122-225; see specifically R. 161, 178, 179, 180, 183, 184. The latest pleadings clearly governs. But petitioner's brief in this court fails on this point to give the amended allegations, which are confessed by petitioner's motion to strike out filed July 19, 1937, R. 228-231, on which final decree was rendered in the trial court.

Petitioner in its second suit also made the Railroad Commission of Texas parties defendants (R. 264-283), alleging that the Railroad Commission should be enjoined

> "from entertaining said appeal and from hearing the same and from taking any action thereon and from taking any action with reference to gas rates in the city of Texarkana, Texas, until after said Southern Cities Distributing Company has complied with the provisions of said franchise agreement calling for one year's notice," (R. 272)

and that respondent be enjoined "from prosecuting or taking any further steps in its appeal which had been lodged with the Railroad Commission of Texas." (R. 281).

The record is as follows:

Respondent's pleadings in the district court, which were confessed by petitioner's motion to strike out, were:

"Defendant denies that on March 12, 1934, the Railroad Commission of Texas made an order allowing said appeal on condition that the company give bond in the sum of ten thousand ($10,000.00) dollars; denies that the Railroad Commission ordered that the action of the city council of January 23, 1934, be suspended or superseded on the filing and approval of such bond. The bond required by the Commission related to an altogether different resolution; to the resolution of December 12, 1933, which was admitted by plaintiff was not a rate-reducing order and of which the Railroad Commission had no jurisdiction."

"Defendant denies that Section VIII-A of the ordinance of June 13, 1930, constitutes a valid and binding waiver by defendant of any right it may have under the statutes of the State of Texas to seek and secure an increase in rates; denies that Section VIII-A is valid; denies that it is necessary to give one-year's notice before an increase in rates should be applied for; denies that the attempt to secure an increase in rates by appeal to the Railroad Commission is in violation of any valid provision of the ordinance of June 13, 1930; denies that defendant waived its right to secure increased rates, except one-year's notice of its intention to apply for same; denies that the Railroad Commission is without jurisdiction of the appeal from the order of January 23, 1934; denies that the Railroad Commission is without power over said appeal. . ." (R. 129, 130).

"Defendant pleads that plaintiff has no cause of action to prevent defendant from pursuing the procedure to increase the prescribed rates, nor to enjoin defendant's appeal to the Railroad Commission

and never had such a cause of action, but the effect of what it did blocked the procedure. Plaintiff alleges that statutes of Texas

> 'provide that pending the hearing before the city council said increased rates should not be placed into effect, and in the event of an appeal, they should not be placed in effect until the appeal should be passed upon by the Railroad Commission.'" (R. 160)

"Article 6058 of Revised Civil Statutes of Texas, of 1925, is construed by the decisions of Texas to provide that where the utility seeks to increase existing rates, the increase cannot be put into effect with or without bond until the commission makes its final order on appeal from refusal of the council to allow the increase. Without notice or hearing, the Railrad Commission of Texas refused to act on defendant's application for a temporary order superseding the existing rates, pending final hearing. The Railroad Commission of Texas has jurisdiction of the appeal from the order of the council dated January 23, 1934, refusing to grant defendant's application of November 3, 1933, but refused to recognize or act upon the appeal at all unless defendant complies with a provision for a certain bond relating solely to the Resolution of December 12, 1933, which the Commission may not legally require. (R. 161)

"The Statute of Texas is construed to require that the existing rates continue in **statu quo** and be not increased until final disposition of the case before the Commission, does not afford an adequate remedy; is invalid as so construed by the courts of Texas; is violative of the due process and equal protection of law clauses of the Fourteenth Amendment to the United States Constitution; requires enforcement of rates that are daily confiscatory until such time as the Commission makes final disposition

which may take from a few months to many months; in the case at bar it is taking years. Defendant alleges that on such appeal the Railroad Commission, unless it can grant supersedeas, is required by law to hear such appeal without requiring the posting of supersedeas bond; and the action of the Railroad Commission in refusing to proceed to hearing is erroneous and contrary to law and deprives defendant of the hearing it is entitled to from said Railroad Commission and of substantial rights. Under such circumstances defendant has the right to maintain its action to charge the rates it applied for in the city council or to fix its own rates, to prevent daily confiscation of its property; defendant ask that the Court sustain this right. Defendant has taken all the steps open to it under the Texas statutes as far as it could." (R. 162)

"The city council on December 12, 1933, in the absence of defendant, its attorneys, witnesses, or representatives and without notice to defendant and without hearing, passed a resolution which referred to a decree in a suit of Southern Cities Distributing Company vs. The City of Texarkana, Arkansas, in the United States District Court for the Western District of Arkansas, dated December 1, 1933, discussed infra." (R. 176-177).

"The Resolution of December 12, 1933 is a nullity, invalid and of no force, it was passed without notice to the defendant and without evidence or a hearing; it was passed in only one reading, the city charter requiring three separate readings on three separate meetings; because there was no publication as required by the city charter; there were failures in other points to comply with the city charter, such as the title, style and caption, emergency, non-reference to committee, no reporting back; passage on the same day of introduction; failure to record proper vote. The only action of

the city council concerning a reduction of rates after notice and hearing is the Resolution of January 23, 1934, which gives notice that the city council would on January 23, 1935, enter into a hearing concerning the reduction of rates in Texarkana, Texas.

"Regarding said Resolution of December 12, 1933, plaintiff in its brief states:

> 'The resolution of the Council shows on its face that it was taken in view of and to secure performance of the franchise agreement of the company, and was not taken under the powers conferred on the Council as a rate regulating tribunal.'
>
> 'This was simply the action of one party to an agreement calling upon the other party to carry out its obligations and directing that suit be brought if such other party refused. It does not purport to be the order of a rate regulating tribunal, made after formal notice and taking of testimony.' (p. 24).

and,

> 'We know of no statute or decision which holds that where a gas company, or any other utility, makes an agreement with a city as to rates or any other matter, than that the City Council may not direct that company to carry out and perform its agreement, or may not direct that suit be brought to compel it to do so, without first giving the company formal notice and opportunity to be heard. The only question for decision was whether the City should insist on the performance of an obligation voluntarily entered into by the gas company. A mortgagor is not entitled to a hearing before the mortgagee calls on him to pay or before the mortgagee orders a foreclosure in the event of non-payment. The maker

> of a note to a bank is not entitled to formal notice and a hearing before the board of directors of the bank before the bank calls an him to pay or orders suit if he fails to r~y.' (p. 25).

"Plaintiff quoting Article 6058 Revised Civil Statutes of 1925, states:

> 'All of this is a description of an appeal from an order of a regulatory tribunal. A resolution of a city council calling upon the company to carry out an agreement to reduce rates is not a *decision, regulation, ordinance or order* reducing rates. What the legislature evidently intended was to provide a review for the actions of the Council as a rate making tribunal, . . . not to subject its franchise agreements to a review by the Commission.'" (p. 27, italics are the plaintiff's). (R. 178-180).

"Defendant, when appealing on March 5, 1934, from the Council's Order of January 23, 1934, denying increased rates, out of caution took the necessary steps to appeal from said Resolution of December 12, 1933, if it were appealable. If said Resolution of December 12, 1933, had been legally passed and were a rate-reducing ordinance within the scope of Article 6058 Revised Civil Statutes of 1925, the petition of plaintiff insofar as based upon said Resolution would be premature. But defendant understands that plaintiff grounds its asserted reparation solely upon Section IX of the franchise ordinance of June 13, 1930, and upon alleged discrimination, and not upon said Resolution of December 12, 1933. Since the Resolution was illegally and improperly passed and since it is conceded not to be a rate-reducing ordinance, the Railroad Commission had no jurisdiction thereof, and the attempted appeal is non coram judice. The bond referred to by the Railroad Commission which pertains only to

said resolution, is unauthorized for this and other reasons shown *infra.*" (R. 180)

"The City did all it could to prevent defendant proceeding with the appeal; on April 21, 1934, it filed in the Railroad Commission Motion to Dismiss the Appeal, or, in the alternative, on account of the injunction and suit, that all further proceedings in the Commission be abated until such time as the litigation in the United States District Court for the Eastern District of Texas should be finally disposed of.

"Defendant undertook to proceed in the Railroad Commission and requested that plaintiff's motion to dismiss the appeal be set for hearing and action, but so far its efforts to get any action at all have been unavailing.

"The Commission made no order, except a provision as condition precedent, shown by its pleadings herein for a certain $10,000.00 bond concerning the Resolution of December 12, 1933, only, and will not act on either of the appeals unless such bond is filed, although the bond was referable only to the order of December 12, 1933. The Commission was and is without legal authority to require bond as to the order of January 23, 1934, and did not attempt to require bond as to such order; the bond named in its order was totally inapplicable thereto; it was also erroneous and inappropriate even to the order of December 12, 1933, above described. Defendant has not filed such bond, but nevertheless expected to prosecute its appeal and would have done so, if it had not been prevented as herein shown. The appeal from the Resolution of January 23, 1934, was from a denial of an application for increased rates; the provision for increase in rates pending the appeal was made, nor could be made under Texas decisions; defendant did not elect to make said bond." (R. 183-184).

The statute governing appeals to the Railroad Commission is as follows:

Article 6058, Revised Civil Statutes of Texas, 1925, provides in part as follows:

> " . . such municipal government shall determine said application within sixty days after presentation unless the determination thereof may be longer deferred by agreement. If the municipal government should reject such application or fail or refuse to act on it within said sixty days, then the utility may appeal to the Commission as herein provided. But said Conmission shall determine the matters involved in any such appeal within sixty days after the filing by such utility of such appeal with said Commission or such further time as such utility shall in writing agree to, but the rates fixed by such municipal government shall remain in full force and effect until ordered changed by the Commission."

Petitioner cites *Box v. Newson* (Court of Civil Appeals) 43 S. W. (2) 981, and contends in its brief that the company's only remedy is to bring an independent suit to mandamus the railroad commission to act, although the city prevented the company from proceeding in the railroad commission (R. 183). Respondent contends that **such collateral lawsuit** and such extended efforts to exhaust state legislative remedies are not required.

In *Pac. Tel. & Tel. Co. vs. Kuykendall* (Taft, 1924), 265 U. S. 196, the telephone company had filed a schedule of rates with the Department of Public Works increasing the rates to be charged. The increased rates were suspended, but later denied supersedeas. The company

sought relief in the federal court, but the court dismissed the bill on the ground that the company had not exhausted state legislative remedies. The U. S. Supreme Court found, that the state court of Washington was part of the valuation tribunal with power to set aside the valuation made by the Departments, and to make a new one; that such review by the state court of the findings of the Department was in a legislative capacity. The court held that as supersedeas was denied the legislative remedy in the state court did not have to be exhausted before resort to the federal court.

In Texas the state legislative remedy in the case of gas rates is in the city council with review by the Railroad Commission, the Railroad Commission is the final legislative body, *Railroad Commission v. Weld & Neville* (Tex. Sup. Ct.) 229 S. W. 301; *Mo. Tex. Tel. Co. v. Sherman*, 4 Northern Sup. 554; *Railroad Com. v. Uvalde* (Civ. App.) 49 S. W. (2) 1113; *M. K. & T. Ry. Co. v. Railroad Com.* 3 S. W. (2) 489, 13 S. W. (2) 679; while in Washington state, the legislative remedy, as shown above, is in the department with review by the state court in a legislative capacity; the state court is the final legislative body. The Railroad Commission in Texas, therefore, occupies a situation like that occupied in Washington state by the state courts.

In case a utility in Washington state seeks to increase rates which have been in force for more than one year, the state statute provides that no supersedeas shall be allowed pending final determination of the appeal in the state court, the final legislative body. Under such circumstances, the fact that the final legislative remedy in the

state court has not been concluded will not prevent a federal court from exercising jurisdiction.

So, in the case at bar in Texas where the company seeks to increase its rates, the state statute as construed by the state court provides that no supersedeas shall be allowed pending final determination of the appeal in the Railroad Commission, the final legislative body. *Harris v. Municipal Gas Co.*, (Tex. Civ. App. 1933) 59 S. W. (2) 355, reads:

> "In the hiking of the rates, however, the utility seeks to better the contract under which it has been willing to work. In such case the presumptions were against it and the Legislature, we believe, saw fit to require that it continue in statu quo until final disposition of its request."

The fact that petitioner prevented the Railroad Commission from acting will not prevent a federal court from entertaining jurisdiction of the case, and making such order as the facts justify if the rates are confiscatory as alleged and confessed.

Such circumstances in the case at bar are claimed by petitioner and apparently correctly, if it were not for the U. S. Constitution, to have the effect that respondent can have no relief whatever for the confiscation it is suffering and will continue to suffer. As to the past period from November 23, 1933, the date respondent asked for said rates to go into effect, until the present time, already some five years, confiscation has accrued in no small sum. And it will continue from the present time, until some future indefinite date. Respondent should not be deprived of the right to answer petitioner's suit. In the

case of *Prendergast v. New York Tel. Co.* (1922), 262 U. S. 43, the court said:

> "Nor did the fact that the orders of the commission merely prescribe temporary rates, to be effective until its final determination, deprive the company of its right to relief at the hands of the court. The orders required the new reduced rates to be put into effect on a given date. They were final legislative acts as to the period during which they should remain in effect pending the final determination; and if the rates prescribed were confiscatory, the company would be deprived of a reasonable return upon its property during such period, without remedy, unless their enforcement should be enjoined. Upon a showing that such reduced rates were confiscatory, the company was entitled to have their enforcement enjoined pending the continuance and completion of the rate-making process. *Cumberland Tel. & Tel. Co. vs. Louisiana Public Service Commission*, supra. And see by analogy, *Oklahoma Natural Gas Co. v. Russell*, supra; and *Love v. Atchison T. & S. F. R. Co.*, 107 C. C. A. 403, 185 Fed. 321, 326, affirming 174 (50) Fed. 59 and 177 Fed. 493."

Pertinent also to the situation in the case at bar is the case of *Smith v. Ill. Bell Tel. Co.* (Sutherland, 1936), 270 U. S. 587, in which the court said:

> "Property may be as effectively taken by long continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them; and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief.

> The facts, which the motion to dismiss conceded, present a far stronger case for such relief than any of the cases with which this court dealt in *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 293; *Prendergast v. New York Tel. Co.*, 262 U. S. 43, 49; Pac. Tel. & Tel. Co. v. Kuykendall, supra, p. 204; and Banton v. Belt Line R. Com. 268 U. S. 413, 415."

In *Oklahoma Natural Gas Co. v. Russell* (Holmes, 1923) 261 U. S. 290 the Commission had denied application of the gas company for higher rates. Oklahoma statutes provide an appeal to the state court which is a legislative proceeding wherein the state court has power to substitute a different rate and grant supersedeas in the meantime. The company had appealed to the state court and applied for supersedeas in order that it might put into effect the higher rates it had applied for, but supersedeas was denied. Thereupon, the company filed suit in the federal court. Relief was denied by the federal court under the *Prentis Case* on the ground that the proceedings in the state court, the final legislative body, had not been concluded. The U. S. Supreme Court, speaking through Mr. Justice Holmes, said:

> "Coming to the principal question, if the plaintiffs respectively can make out their case, as must be assumed for present purposes they are suffering daily from confiscation under the rate to which they are now limited. They have done all that they can under the state law to get relief and cannot get it. If the Supreme Court of the state hereafter shall change the rate, even nunc pro tunc, the plaintiffs will have no adequate remedy for what they may have lost before the court shall have acted. *Springfield Gas & Elec. Co. v. Barker*, 231 Fed.

331, 335. In such a state of facts *Prentis v. Atlantic Coast Line Co.*, has no application. See *Love v. Atchinson, T. & S. F. R. Co.*, 107 C. C. A. 403, 185 Fed. 321, 324, 325. Rules of comity or convenience must give way to constitutional rights. In the case cited, there was no doubt as to the jurisdiction of the circuit court, but simply a decision that the bills should be retained to await the result of appeals if the companies saw fit to take them. 211 U. S. 232. The companies had made no effort to secure a revision and there had been no present invasion of their rights but only the taking of preliminary steps toward cutting them down. In such circumstances, it was thought to be more reasonable and proper to await further action on the part of the state.

"As in our opinion the district court had jurisdiction and a duty to try the question whether preliminary injunctions should issue, and as that question has not yet been considered the cases should be remanded to that court, with directions to proceed to the trial."

The principles set forth in the above cases of *Pacific Tel. & Tel. Co. v. Kuykendall* and *Oklahoma Natural Gas Co. v. Russell*, supra, were later expressly approved by the U. S. Supreme Court in *Porter v. Investor's Syndicate* (Roberts, 1932) 286 U. S. 461, where, however, a different result was reached because of a different situation. This case dealt with a controversy arising in Montana where the original legislative body is a Commissioner and where a legislative appeal is provided to the Montana state court, the final legislative body. The company in that case, contended that the fact that it had not first proceeded in the state court was not a bar to its suit in the federal court, on the ground that the state court, the final legislative body,

was forbidden by statute to grant interlocutory relief and supersedeas pending final decision. The U. S. Supreme Court held against the company and dismissed its suit because the state statute authorized a stay pending final decision and there had been no denial of supersedeas by the state legislative body; but the court, expressly recognizing that, if the state statute had not provided a stay, the company could have at once resorted to the federal court:

> "But where either the plain provisions of the statute (Pac. T. & T. Co. vs. Kuykendall, supra) or the decision of the state court interpreting the act (Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 67 L. Ed. 659) precludes a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exists recourse, to a federal court is justified." (286 U. S. 741).

In *U. S. v. Abilene & S. R. Co.* (Brandeis, 1924) 265 U. S. 274, the court said:

> "First. The Commission moved, in the district court, to dismiss the bill on the ground that the suit was premature."
>
> **"But in the absence of a stay, the order of a division is operative; and the filing of an application for a hearing does not relieve the carrier from the duty of observing an order. Despite the failure to apply for a rehearing, the court had jurisdiction to entertain this suit.** *Prendergast v. New York Tel. Co.* 262 U. S. 43, 48, 49. Compare *Chicago R. Co. v. Illinois Commerce Commission*, P. U. R. 1922C, 282, 277 Fed. 970, 974. Whether it should have denied relief until all possible administrative remedies had been exhausted was a matter which

called for the exercise of its judicial discretion. We cannot say that, in denying the motion to dismiss the discretion was abused."

It is submitted that respondent's answer, that the Section V. rates, or any less rates, are confiscatory, which is confessed by petitioner's motion to strike out, should not be overruled without a judicial hearing on the merits of the rates.

POINT II.

SECTION IX WAS INAPPLICABLE AND ITS CONDITION WAS NOT FULFILLED.

Section IX reads:

"If Grantee shall be finally compelled to, or should voluntarily, place in any rates in the City of Texarkana, Arkansas, less than the rates granted by this Ordinance then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate."

The Court of Appeals in the opinion under review said:

". . . That the decree should be reversed, both because the clause is completely invalid, and because, if valid and enforcible, it is without application here. . ." (R. 431; 97 F (2) 5, 9).

Respondent, defendant in the district court, pleaded amongst others, the following as to the application of Section IX:

"(t) It is too vague, obscure and uncertain to be applicable or enforceable; its meaning is not susceptible of ascertainment;" (R. 152)

"(u) If it could be applicable or enforceable as to any period of time, it is too vague and uncertain as to other periods of time;" (R. 153)

"(y) Because Section IX is incapable of any reasonable application. Plaintiff in its brief at p. 5 says:

> 'So far as the rights of the consumers in Texarkana, are concerned, the court cannot now pass upon them from and after February 16, 1934. If the gas company is successful in its Arkansas suit, then there will have been no discrimination from and after February 16, 1934.'

"The reason for this statement is that from February 16, 1934, to December 4, 1936, the rates in Texarkana, Arkansas, were higher than the rates charged in Texarkana, Texas. If defendant is successful on appeal to the U. S. Circuit Court of Appeals in the Arkansas suit, defendant will charge higher rates in Arkansas than the prescribed rates in Texas. The rates charged in Texarkana, Arkansas, from February 16, 1934, to December 4, 1936, were:

"$1.75 for the first 1,000 cu. ft. of gas,
"$ .75 each for the next 2,000 cu. ft.,
"$ .55 each for the next 7,000 cu. ft.,
"$ .35 for each additional 1,000 cu. ft.

"From the statement of plaintiff above quoted, that 'the Court cannot now pass upon' the rates in Texarkana, Texas, 'from and after February 16, 1934,' and the statement that, 'If the gas company is successful in Arkansas suit, then there will have been no discrimination from and after February 16, 1934,' it would follow there would be, in Texarkana, Texas, from February 16, 1934, until some time in future, a *hiatus* in which no one would be able to say what have been the applicable gas rates in Texarkana, Texas, since February 16, 1934. The ground offered by the plaintiff for the

existence of such queer condition is that Texas rates are dependent upon the success or failure of defendant in the Arkansas suit. Such supposed impossibility, of determining, by any means within or without the State of Texas, what are the legal rates in Texarkana, Texas, illustrates the principle, that the City cannot delegate or surrender the regulatory power; that, where a power is granted and the method of its exercise prescribed, that method excludes all others and must be followed. If defendant shall be required to make reparations as to dates prior to February 16, 1934, it would necessarily be on the ground that prior to February 16, 1934, the 1923 Arkansas rate became applicable in Texarkana, Texas, and not the rate prescribed by the City Council of Texarkana, Texas, in Section V of the ordinance of June 13, 1930.

"If reparation or reduction should be required since February 16, 1934, or if defendant should be required to reduce its rates in Texarkana, Texas, and if defendant should be successful in the appeal in the Arkansas suit, the prescribed rates in Texarkana, Texas, would become again operative and judgment would have to be rendered against the gas consumers in Texarkana, Texas, in favor of defendant.

"If defendant should be required to reduce its rates in Texarkana, Texas, below the prescribed rates, and if the rates in force in Arkansas from February 16, 1934, to December 4, 1936, should be upheld in the Arkansas appeal, the rate in Texas would of and from said date be increased to those prescribed in Section V of the ordinance of 1930 automatically and retroactively, and without action of the City Council of Texarkana, Texas.

"On the other hand, if defendant should lose the appeal in Arkansas, the rates prescribed in 1930 in Texarkana, Texas, would under the claim of said

City, have had **no operative force even for one instant.** If reparation should be ordered, it would mean that defendant would have to pay out the difference between the revenues collected under the rates prescribed by the City Council of Texarkana, Texas, and the calculated revenues that would result from applying the Arkansas rates of 1923 to the gas consumed in Texas; and that defendant adopt Arkansas rates in Texas, though under appeal and though conflicting with the prescribed rates.

"Section IX conflicts with and, if valid, would operate to change the laws of Texas, to deprive the Council of its jurisdiction, to unlawfully abrogate prescribed rates, to delegate and vest in extra-territorial authorities and bodies outside the State of Texas, the non-delegable police or rate power. Moreover, the rates would vary upon contingencies.

"(z) Because of the grounds set forth as to Section VIII-A, *infra.*

"(3) Section IX, even if valid, is not applicable to the situation in the case at bar.

"(a) It is not applicable to the period from June, 1930, to December 1, 1933, it is not retroactive.

"(b) Section IX is not applicable to the period subsequent to November 23, 1933; defendant from and after said date had the right to charge reasonable rates without being limited to the prescribed rates of Section V of the ordinance of June 13, 1930, or to the rates prescribed in 1923, or to any lower rates than those applied for in the City Council of November 3, 1933; defendant exhausted all legislative remedies open to it and under the circumstances plaintiff has no right to enforce confiscatory rates.

"(c) As to the period from December 1, 1933, to February 16, 1934, Section IX is inapplicable; the

rates in Texarkana, Texas, were under contest; and the rates in Texarkana, Arkansas, were in contest.

"(d) As to the period from February 16, 1934, to December 4, 1936, Section IX is inapplicable; the rates in Texarkana, Arkansas, were higher during said period, and are involved in the appeal to the United States Circuit Court of Appeals for the Eighth Circuit. Supersedeas was granted in Texarkana, Arkansas, against any refunds during that period.

"(e) Section IX is inapplicable to the period from December 4, 1936, to any subsequent times; the rates in Texarkana, Arkansas, in said period are under contest and are involved in the appeal to the United States Circuit Court of Appeals for the Eighth Circuit." (R. 153-157).

"(g) Section IX is inapplicable to period of time since January 23, 1935; plaintiff itself on January 23, 1934, gave notice that it would on January 23, 1935, enter upon hearing for change and modification of rates." (R. 158). But no hearings were held and no rate-reducing order was made.

In the case of *Dallas Power & Light Corp. v. Carrington* (Tex. Civ. App.), 245 S. W. 1046, the Court said:

". . . An ordinance is a by-law of a municipality passed by its governing body for the regulation, management, and control of its affairs and that of its citizens. Its validity is dependent upon strict compliance with the laws of the state relative to legislative enactments and upon the terms of such city's charter if it has one. It must be clear, definite, and free from ambiguity. Measured by these rules, the ordinance of October 14, 1920, passed by the council of Highland Park, cannot stand. It seeks merely to adopt the provisions of the Dallas franchise relating to service and rate 'in so far as

> applicable to Highland Park.' As counsel for appellant facetiously remarks: 'How far is that?' Such ordinance is manifestly too vague and obscure to have any validity, and therefore is void; its meaning not being susceptible of ascertainment. McQuillin on Municipal Corporations, Sec. 651; State v. Cedaraski, 80 Conn. 478, 69 Atl. 19; Chicago I. & L. Ry. Co. v. Salem, 166 Ind. 71, 76 N. E. 631; San Francisco Woolen Factory v. Brickwedel, 60 Cal. 166."

The facts in Texarkana, Arkansas, have been set out in the statement of the case by respondent in this brief under the sub-heading "Events in Texarkana, Arkansas." (pages 6-11).

The rule is that the prescribed rates until set aside are final and controlling upon the utility and the public alike; they are uncontrovertible. See "C. The Rates in Section V of the ordinance of June 13, 1930, are controlling", supra.

If Section IX could be held valid, it must be interpreted in the light of that rule. Section IX certainly provides for no refunds. The court is requested in this connection to consider the argument in this brief, supra, under subdivision (F), as to asserted discrimination. The *Carrington Case* therein cited awarded no reparations for past differences in rates, and supports no proposition that would entitle petitioner to recover reparations in the case at bar where respondent on a technicality in a lawsuit in Arkansas was forced to make reparations in Arkansas and to serve for a short temporary interim period of two and one-half months at rates that would confessedly be confiscatory in Texarkana, Texas. Such a situation was not unlawful

discrimination as shown under the sub-heading (F) as to asserted discrimination.

Petitioner has on page 86 asserted to this court that the 45c rate in Arkansas under contest in the Arkansas appeal, is now effective in Arkansas while a $1.00 rate is being charged in Texas, and thus produced a grossly erroneous impression. The truth is that the rate for the average consumer in Texarkana, Arkansas, under the 45c rate will amount to only about 5c less per 1000 cu. ft. than the average Texarkana, Texas, consumer under the existing rates. And yet for a period of nearly three years the rates were considerably higher in Texarkana, Arkansas, than in Texarkana, Texas.

Petitioner argues that the sense of Section IX was that the reparations for the Arkansas consumers should be held to entitle petitioner to recover reparations in Texas retroactively back to the very date the city council passed an ordinance of June 13, 1930, for application in the city of Texarkana, Texas.

This is not what Section IX says. The condition or effective date set out in Section IX is not to be prior to such time as grantee may have been **finally compelled** to place into effect in the city of Texarkana, Arkansas, less rates than those prescribed in the Texarkana, Texas, ordinance. Only on that condition and only at such time could Section IX apply, even if it were valid. "Then and thereupon, the lessened rate **shall** apply. . . ." This is purely future. No such time has yet occurred under the facts in the record in the case at bar. The contest over the

Arkansas rates was not finally settled and petitioner was not finally compelled or forced to lower rates in Arkansas, when the case was filed or pending in the district court. Petitioner however seeks to go back and upset the rates prescribed in Section V of the ordinance of June 13, 1930, from the very day it was originally passed—in order words, to abrogate it **ab initio—to prevent it from ever having had any effect whatever, even for one instant of time,** and to recover over $150,000 reparations for the past eight years. Surely no such uprooting of the ordinance and consequent catastrophe to the company is sustainable.

Moreover, the petitioner sought to have the unsettled Arkansas rates enforced in the city of Texarkana, Texas, at the time the case was tried below, and to secure reparations during the pendency of the appeal in the Eighth Circuit. Petitioner admitted:

> "So far as the rights of the consumers in Texarkana, are concerned, the court cannot now pass upon them (the rates) from and after February 16, 1934. If the gas company is successful in its Arkansas suit, then there will have been no discrimination from and after February 16, 1934." (R. 153, 154).

If reparations or reduction from and after February 16, 1934, had been required in Texarkana, Texas, and if respondent had later been successful in the appeal in the Arkansas suit, the prescribed rates in Texarkana, Texas, would become again operative and judgment would have had to go against the gas consumers in Texarkana, Texas, in favor of respondent. If respondent had been required to reduce its rates in Texarkana, Texas, below the prescribed rates, and if the rates in force in Arkansas

from February 16, 1934, to December 4, 1936, had been upheld in the Arkansas appeal, the rate in Texas would of and from said date have been increased to those prescribed in Section V of the ordinance of 1930 automatically and retroactively, and without action by the city council of Texarkana, Texas.

If reparation should be ordered, it would mean that respondent would have to pay out the difference between the revenues collected under the rates prescribed by the city council of Texarkana, Texas, and the calculated revenues that would result from applying the Arkansas rates of May 8, 1923, to the gas consumed in Texas; and that respondent adopt Arkansas rates in Texas, though conflicting with the prescribed rates and though conflicting with any schedule that had ever been adopted in Texas and though introducing into Texas, the Arkansas regulations regarding charges where a meter is cut off for nonpayment of bills, or, where connections are changed within twelve months.

Petitioner states that prior to May 30, 1930, the rates in Texarkana, Texas, and Texarkana, Arkansas, were the same, but there were material differences. The rates in Texarkana, Arkansas, prior to May 30, 1930, were those prescribed in an order in that city dated May 8, 1923. These rates were materially different in certain respects from the rates in Texarkana, Texas, prior to May 30, 1930, which were prescribed in an ordinance of March 13, 1923. (R. 64-67). There are no provisions in said Texarkana, Texas, ordinance similar to the payments required in Article E of said Arkansas rates of May 8, 1923. (R. 224).

Section IX, if it should be held to be valid or capable of application under any circumstances, is not applicable to the periods prior to such time as respondent shall have been finally compelled to place into effect in Texarkana, Arkansas, less rates than those set out in Section V.

According to the record in this case the condition of Section IX has not been fulfilled. Respondent has not been finally compelled to place into effect, nor has it voluntarily placed into effect, in the city of Texarkana, Arkansas, any rates less than those prescribed in Texarkana, Texas, in Section V of the ordinance of June 13, 1930. The specified time has not arrived. Respondent did not voluntarily change its rates in Texarkana, Arkansas, but petitioner contends that respondent was finally compelled to do so, which was denied by respondent and confessed by petitioner's motion to dismiss. As a matter of fact the difference in the rates charged in the two cities for the period under review has favored Texarkana, Texas. For a period of nearly three years the rates were considerably higher in Texarkana, Arkansas, than in Texarkana, Texas, although the rates were temporarily somewhat lower in Texarkana, Arkansas, than in Texarkana, Texas, for the short space of two and one-half months required for preparing and filing suit. It was not on the merits of the rates but on technicalities of procedure in litigation in Arkansas that the new suit was required. This short temporary period of two and one-half months lasted only during the time that was required for preparing and filing suit, and when suit was filed, the rates in Texarkana, Arkansas, became considerably higher than in Texarkana, Texas, and so remained for nearly three years and the

litigation for the period is, according to the record, not yet finished, but is still pending. It is obvious that the fact that temporary rates were charged in Texarkana, Arkansas, during the time for preparation of suit does not amount to a final settlement of the rates in Texarkana, Arkansas, nor to a final compulsion, nor to the fulfillment of the condition of Section IX. The controversy was still unsettled in Arkansas; whereas the condition is that grantee shall have been finally compelled to place in effect in Texarkana, Arkansas, rates that are less than those prescribed in Section V of the ordinance of June 13, 1930, in Texarkana, Texas.

The district court's decree held that for the period of time prior to December 1, 1933, no refunds were due, that Section IX was inapplicable to such period, but that Section IX did apply to the temporary short interim period of time from December 1, 1933, to February 16, 1934, on the ground that Section IX required respondent to charge in Texarkana, Texas, the Arkansas rates of May 8, 1923, for said period, and adjudged reparation for said period, R. 234. As to claimed reparations from and after February 16, 1934, the district court held the suit was premature and that petitioner was not then entitled to require reduced rates subsequent to that date, because the condition of Section IX was not fulfilled; because the rates had never been finally compelled, and therefore respondent could not possibly be considered as liable, although the decree stated that it was without prejudice to petitioner's right to institute a new suit, as, if, and when, the city of Texarkana, Arkansas, should win out in its then pending litigation.

The Court of Appeals held that Section IX was inapplicable to any of the periods of time claimed by petitioner, even if Section IX were assumed to be valid. This holding of the Court of Appeals is not due to any strained reasoning, but arises because the language in Section IX is in too plain English to permit a contortion of its meaning to anything else. Petitioner at p. 88 apparently concedes that its interpretation is a contortion of the words, for it desires this court to transpose, reject, and supply words. Petitioner makes the unsupported assertion that Section IX, as it is ambiguous, was to prevent discrimination as to rates against the Texas consumers. If so, the rules of discrimination, as set out in subdivision (F), Point I of respondent's brief, would apply. But if Section IX is ambiguous, petitioner's interpretation and allegations are not to be accepted as true in fact, because respondent in its pleadings denied petitioner's allegations and is to be taken as confessed in view of petitioner's motion to strike out. Respondent denied that Section IX was designed to take care of the situation in the event the Arkansas resolution of May 30, 1930, should be upset by an election in Arkansas. It was never contemplated that referendum was applicable to it. It was understood that the rates prescribed in Section V of the ordinance of June 13, 1930, in Texarkana, Texas, would be binding until such time in the future after reduced rates in Arkansas should be adjudicated, finally compelled, and placed into effect, on the merits of the rates growing out of a new and future application on the part of the Arkansas city, and that was the only contingency contemplated. The reason for this was that the Texas side had borne the expense of the rate hearings in 1930 prior to June 13, 1930, and it was contem-

plated that if future hearings should be had that the Arkansas side would bear the expenses, and that the Texas side should not make any move until after the time and condition had been fully met and respondent shall have been **finally compelled** to place in any rates in the city of Texarkana, Arkansas, less than the rates in Section V of the ordinance of June 13, 1930, and then and thereupon, and only then and thereupon, the lessened rate shall apply to the city of Texarkana, Texas, and grantee should not be authorized or permitted to charge and collect any higher rate.

Section IX says that when the gas company "shall be finally compelled to, or shall voluntarily, place in any rates in the city of Texarkana, Arkansas, less than Texas rates, then and thereupon the lessened rates shall apply in Texarkana, Texas." It is perfectly plain that respondent has never voluntarily lowered its rates on the Arkansas side. Nor had it ever been finally compelled to reduce its rates so far as the record in this case shows. Petitioner in its brief states that certain events have taken place since the trial in the district court and appeal therefrom, but no theory is presented which would authorize them to be brought into this case at this stage, certainly not until petitioner shall have amended its pleadings and shall have incorporated them in the record. Such amended pleading would probably include an allegation that since the decree in the district court and appeal to the Fifth Circuit, the Eighth Circuit had affirmed the federal district court in Arkansas; that thereafter in *Arkansas Louisiana Gas Company v. City of Texarkana, Arkansas*, No. 72, certiorari was refused on October 10, 1938; that then and thereupon respondent was finally compelled to place in

any rates in the city of Texarkana, Arkansas, less than the rates prescribed in the Texas ordinance, and that then and thereupon the lessened rate shall apply to the city of Texarkana, Texas, and that respondent shall not be thereafter authorized nor permitted to charge and collect any higher rate. That date would be the date at which petitioner first could contend that it had a cause of action under Section IX, assuming that Section IX is absolutely valid, capable of the interpretation placed on it by petitioner, and not too vague and obscure for its meaning to be capable of ascertainment. It will be time enough to consider such suit when it shall have been brought. Any action brought prior to that time is bound to be premature. The words "then and thereupon" in Section IX clearly indicate that no rate adjustment on the Texas side will take place until a less rate shall have been adjudicated and finally compelled and placed in effect for Arkansas, and that the Texas side will benefit only prospectively from the time such final compulsion in Arkansas should be enforced, and not retroactively so as to upset business dealings on the Texas side for years back as the petitioner here contends. That respondent had never voluntarily changed its rates or been finally compelled so to do in Arkansas was confessed by petitioner's motion to strike out. The condition of Section IX had therefore never been fulfilled.

Petitioner states that respondent cannot contend that any reason exists why it should be permitted to charge more in Texas than in Arkansas. This assumes a premise that is not present in the case at bar, but, if it were, this whole brief shows the circumstances of this case and many reasons. This has been discussed under subdivision (F), Point I, dealing with asserted discrimination, but the

significant fact is that petitioner is seeking to enforce in Texarkana, Texas, rules and rates that are confessedly confiscatory and that have never been adopted by any regulatory body in Texas. Under the case of *Wabash Valley Electric Company v. Young*, 287 U. S. 488, the unit is the city, and respondent is not permitted to throw the Arkansas distributing plant into a common pool with the Texas distributing plant. A mere difference in rates between two cities, even where similar conditions exist which is denied in the case at bar, does not justify the conclusion that one is too high and one is too low. Particularly is this true where each city comes under laws of two separate and different sovereignties, having different taxes, license fees, occupation taxes, operating conditions, and where few conditions are the same, R. 153. There was no argument of discrimination in the three years when the Texas rates were lower than the Arkansas rates, likely because those now complaining were enjoying then a difference in their favor. The fact is that for rate-making purposes, the facts are different and laws of Arkansas and Texas are altogether distinct and unrelated to each other.

CONCLUSION.

It is therefore respectfully submitted that the decree of the Court of Civil Appeals be affirmed.

HENRY C. WALKER, JR.,
WILLIAM C. FITZHUGH,
WILLIAM H. ARNOLD, JR.,
Counsel for Respondent.

December 3, 1938.

APPENDIX

CITY CHARTER SECTIONS.

The city charter of Texarkana, Texas (H. B. 743) approved May 2, 1907, is entitled,

> "An Act to incorporate the city of Texarkana, Texas, as a city of the first class, as a city of ten thousand and over inhabitants; to grant to the said city a special charter; to repeal all laws in conflict herewith; and declaring an emergency.
>
> "Be it enacted by the Legislature of the State of Texas:
>
> Section 1. That the following described territory, together with the inhabitants thereof, is hereby incorporated for municipal purposes,"

As pleaded by defendant at R. 163, the said city charter contains the following provisions which are the only ones relevant to this case:

> *Sec. 33.* COUNCIL——ORDINANCE——TITLE——The style, title and caption of all ordinances shall be "Be it ordained by the City Council of the City of Texarkana, Texas," but the same may be omitted from ordinances published in book or pamphlet form.
>
> *Sec. 34.* COUNCIL——ORDINANCE COMMITTEE——All ordinances when introduced before the council, except in cases of emergency, shall be referred to an ordinance committee, to be appointed by the council, and such ordinance introduced may be printed for the use of the members of the council, but no ordinance shall be so changed or amended as to change its original purpose.
>
> All ordinances referred to said committee shall be reported back to the council at its next regular meeting, unless otherwise ordered by the council, with the report of said committee thereon annexed thereto.

Sec. 35. ORDINANCE_____READING_____No ordinance shall be passed, except in case of emergency, until the same shall have been read in full in two several meetings of the city council.

Sec. 36. ORDINANCE_____PASSAGE_____No ordinance shall be passed upon the day it is introduced before the council for the first time, except in cases of emergency, and in all cases of emergency the council shall have the power to pass such ordinances as may be deemed necessary under the emergency clause, without referring same to the ordinance committee upon request of the mayor and the vote of the three-fifths of all the aldermen present.

Sec. 37. ORDINANCE_____AYES_____NAYS _____The ayes and nays shall be taken upon the final passage of all ordinances or resolutions, and entered upon the minutes of the council by the city secretary, and every ordinance or resolution shall require for its passage an affirmative vote of a majority of all the aldermen elected, except on ordinances or resolutions granting franchises or levying taxes, in either of which events it shall require for the passage of such ordinance or resolution an affirmative vote of three-fifths of all the members elected to the city council.

Sec. 160. FRANCHISE_____VOTE._____The rights of the City of Texarkana in the use of the public streets, alleys, squares, parks, bridges and all public places are hereby declared to be inalienable to any person, firm or corporation, except by license permit and franchise passed by the city council on the affirmative vote of three-fifths of all the members of said council elected.

Sec. 161. TERM._____No franchise, lease or permit to the use of the streets, alleys, squares, parks, bridges or other public places or the use of either or any of them shall be made by the city council for a longer term than twenty-five years.

Sec. 162. ORDINANCE—PUBLICATION. —Before any grant of franchise shall be made by the council, the terms thereof embodied in the form of an ordinance, as agreed to by the applicant and the council, shall be published in full, for one week next before the date of its passage, in the official newspaper of the said city, and publication to be paid for by the applicant.

Sec. 163. TERMS.—Said proposed franchise shall contain all the terms and agreements between the parties thereto, and it must expressly set forth that the council shall have the right and privilege of regulating and controlling the operation of all business done thereunder, fixing fares, rates, tolls and charges and inspecting the business and work from time to time as it progresses, and rate regulations shall conform to Section 197 of this charter.

Sec. 163a. TERMS.—In the event that any franchise or permit is so given by said council, which shall not contain such stipulations therein as provided for in Section 162 of this charter, then it shall, nevertheless, be considered that all of the said stipulations contained in said Sections 162, 163 and 197 are part and parcel of the said contract and franchise, just as though written therein, and the said applicant so accepting such franchise, as well as their heirs, assigns and successors, shall be held and firmly bound thereto, notwithstanding such omissions. As amended by 31st Leg., passed under emergency clause.

Sec. 164. READINGS—THREE MEETINGS. —No franchise shall be granted under the emergency clause and none shall be granted until after due publication and after being read in full in three several meetings of the city council, and any franchise granted hereunder, which is not in accordance with the provisions of this section, shall be subject to be set aside by any person interested in a suit for that purpose.

Sec. 196. That the city council shall have the power to regulate by ordinance the rates and compensation to be charged by all water, gas, light and telephone companies, corporations or persons using the streets and public grounds of said city and engaged in furnishing water, gas, light and telephone service to the public, and to prescribe reasonable rules and regulations under which such commodities shall be furnished and services rendered, and to fix penalties to enforce such charges, rules and regulations; provided, that the city council shall not prescribe any rate or compensation which will yield less than ten per cent per annum net on the actual costs of the physical properties, equipments and betterments. Said city council may also fix the charges which may be collected for transporting passengers and baggage in vehicles engaged in public service.

Sec. 197. FARES——TRANSFERS——The said council shall have the power to require by ordinance under proper penalties that any street or electric railways using any of the streets of the said city shall, for the fare prescribed for one continuous passage, give a transportation transfer from any of its lines to any other line in the city, whether such other line be owned by it or any other company, and in addition to the penalties prescribed by ordinance for the failure to give transfers, shall have the right by mandamus, or other proper remedy in any court of competent jurisdiction, to enforce any ordinance requiring the giving of transfers by any electric railway company.

ARTICLE 1119 REV. CIVIL STATUTES.

Article 1119 Rev. Civil Statutes of Texas enacted in 1907 remained in full force and effect from 1907 until amended in 1937. The amended Article of 1937 is not relevant to this case. We therefore set out the original article.

Article 1119.

Art. 1119 (1018) Rates prescribed, etc.—The governing body of all cities and towns in this State of over two thousand population, incorporated under the general laws thereof, shall have the power to regulate, by ordinance, the rates and compensation to be charged by all water, gas, light and sewer companies, corporations or persons using the streets and public grounds of said city or town, and engaged in furnishing water, gas, light or sewerage service to the public, and also to prescribe rules and regulations under which such commodities shall be furnished, and service rendered, and to fix penalties to enforce such charges, rules and regulations. The governing body shall not prescribe any rate or compensation which will yield less than ten per cent per annum net on the actual cost of the physical properties, equipment and betterments. (Acts 1907, p. 217, par. 1).

The amendatory act 1931, 42nd Leg., p. 380, ch. 226, par. 1, was held invalid in Texas-Louisiana Power Co. v. City of Farmersville (Com. App.) 67 S. W. (2d) 235, rev'g (Civ. App.) 55 S. W. (2d) 195, leaving original act in full force and effect.

ARTICLE 1124 REV. CIVIL STATUTES.

Article 1124 Rev. Civil Statutes of Texas of 1925 is as follows:

> Any city having a special charter or a charter adopted or amended under the provisions of chapter 13 of this title, and having authority under its charter to determine, fix and regulate the charges, fares or rates of compensation to be charged by any person, firm or corporation enjoying a franchise in said city, shall in determining, fixing and regulating such charges, fares or rates of compensation, base the same upon the fair value of the property of such person, firm or corporation devoted to furnishing service to such city, or the inhabitants thereof, and not upon any stocks or bonds issued or authorized to be issued, by, or any other indebtedness of, such person, firm or corporation. No city shall be responsible, for, concerned with, authorize, approve or have jurisdiction over, the issuance of sale of any stocks or bonds by any such person, firm or corporation, but the issuance and sale thereof shall be governed solely by the Constitution and laws of this State applicable thereto. (Acts 1st C. S. 1921, P. 152).